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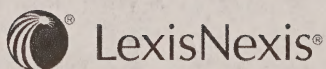
THE STATE OF ARKANSAS

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TITLE 5

CRIMINAL OFFENSES

(CHAPTERS 50-79 IN VOLUME 3B)

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SUBTITLE 1. GENERAL PROVISIONS

CHAPTER 1

GENERAL PROVISIONS

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Deadly Weapon.

Evidence was sufficient to find that the object used in a stabbing was a deadly weapon in the manner of its use, even though it was not identifiable, because it was sharp, pointy, and when stabbed at the victim was capable of penetrating his torso and puncturing his lung. *Medlock v. State*, 2013 Ark. App. 609 (2013).

Because there was evidence that defendant's accomplice caused injury to the victim using a deadly weapon, and because the jury was instructed on accomplice liability, there was sufficient evidence presented to support defendant's second-degree battery conviction as the baseball bat swung by the accomplice, while not specifically designed for the purpose of inflicting death or serious physical injury, could clearly be used in a manner capable of causing death or serious physical injury when it was swung at the victim with the intent to strike her, and did strike her and fracture her hand. *Wimbley v. State*, 2014 Ark. App. 405, 437 S.W.3d 132 (2014).

State sufficiently showed a beer bottle was a deadly weapon because the bottle, being glass, was capable of greater damage than was inflicted. *Wheeler v. State*, 2017 Ark. App. 540, 532 S.W.3d 602 (2017).

Element of Offense.

Substantial evidence existed to support a second-degree murder conviction because defendant's justification defense could have been reasonably rejected; the jury could have credited testimony indicating that defendant walked towards the victim holding a gun after being told that the girls present did not want to fight. *Moody v. State*, 2014 Ark. App. 538, 444 S.W.3d 389 (2014).

In a trial for manslaughter under § 5-10-104, the circuit court erred when it did not instruct the jury on justification because, under § 5-2-614, if defendant was reckless or negligent in forming the belief that force was necessary, then, and only then, was the defense unavailable; however, if defendant was not reckless or negligent in forming his belief, the defense was available, and that was a decision for the jury. *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308 (2018).

Person.

Arkansas Criminal Code expressly limits criminalizing conduct with respect to an unborn child to homicide offenses, and even then, does not allow a mother to be charged or convicted of any homicide offense while her child is in utero. Therefore, a conviction under § 5-13-210 for introduction of a controlled substance into the body of another person based on defendant's ingestion of drugs while pregnant could not stand. *Arms v. State*, 2015 Ark. 364, 471 S.W.3d 637 (2015).

In a death penalty case, defendant's argument that the circuit court erred in permitting the jury to consider the death of the victim's unborn child as an aggravating circumstance under § 5-4-604 was abandoned below and could not be raised on appeal because defendant did not conclusively show prejudice, and he failed to show that the Supreme Court would unquestionably grant him Rule 37 relief on the issue. *Smith v. State*, 2018 Ark. 277, 555 S.W.3d 881 (2018).

Wicks exception for matters essential to consideration of the death penalty did not apply to the circuit court's failure to bring to the jury's attention that a "person" could not be an unborn child as it applies to the aggravating circumstances listed in § 5-4-604; while the prosecutor chose not to file a separate homicide charge for the death of the victim's unborn child, he could have. *Smith v. State*, 2018 Ark. 277, 555 S.W.3d 881 (2018).

Physical Injury.

Suspension of an earlier sentence was properly revoked because defendant committed domestic battery in the third de-

gree where an infant child suffered an arm fracture in defendant's care, and a medical examination revealed healing fractures other places; moreover, there was evidence that other injury incidents had occurred while the child was in defendant's care, and there was testimony that defendant was too rough with the child. The standard for reckless was what a reasonable person in the circumstances would have observed. *Singletary v. State*, 2013 Ark. App. 699 (2013).

Evidence was sufficient to support the revocation of a probationary sentence based on defendant's commission of domestic battering in the third degree. Defendant's boyfriend reported the incident to police, and photographs of his injuries were admitted into evidence without objection; defendant did not contest that her boyfriend was a household member or that his injuries met the statutory definition of "physical injury", and the boyfriend's testimony was sufficient to show that defendant caused the injuries recklessly or purposefully. *Glennon v. State*, 2016 Ark. App. 25, 480 S.W.3d 894 (2016).

Evidence supported the second-degree domestic battering conviction under § 5-26-304 where neighbors heard sounds of loud banging and yelling, and defendant beat the child with a leather belt repeatedly for at least five minutes, causing welts and lashings. *Jefferson v. State*, 2017 Ark. App. 492, 532 S.W.3d 75 (2017).

Possess.

Evidence supported the State's assertion that the cocaine was found in a place immediately and exclusively accessible to defendant and was subject to his control, as the container with the cocaine was found clearly visible in the passenger seat of defendant's car, and he was alone. Although defendant claimed he had no knowledge of the container and that another person had been a passenger, the circuit court did not find his testimony to be credible. *Clark v. State*, 2015 Ark. App. 679, 477 S.W.3d 544 (2015).

State did not have to prove that defendant physically held the contraband because he had constructive possession of the contraband; all of the contraband was immediately accessible to defendant and in his exclusive control as the only occupant of the vehicle. Thus, counsel's no-merit brief was proper and his motion to

be relieved was granted because counsel correctly asserted that there could be no meritorious challenge to the trial court's determination that defendant was in possession of the firearm, methamphetamine, and drug paraphernalia. *Gill v. State*, 2017 Ark. App. 22, 511 S.W.3d 865 (2017).

Evidence was sufficient to convict defendant of possession of three controlled substances because the substances were all found in a boot owned by defendant in the bed of his pickup truck; and there was no evidence that anyone else was in the truck or exercised any form of control over the truck. *Vonholt v. State*, 2018 Ark. App. 53, 540 S.W.3d 312 (2018).

Purposely.

Evidence presented was substantial enough that the jury did not have to resort to conjecture to convict defendant of first-degree murder, given in part that witnesses testified that defendant and the victim had been fighting, and although defendant claimed self-defense, the victim was shot in the head, which supported the idea that the victim was shot intentionally, not during a struggle for defendant's life. *Toombs v. State*, 2015 Ark. App. 71, appeal dismissed, 2015 Ark. 471 (2015).

Serious Physical Injury.

Trial court did not err in denying defendant's motion for a directed verdict on the aggravated-robbery offense as the State presented evidence that the victim suffered serious physical injury; as a result of the attack, the victim had little control over his right side, suffered partial memory loss, was confined to a wheelchair, and would require constant care for the rest of his life. *Britt v. State*, 2015 Ark. App. 456, 468 S.W.3d 285 (2015).

Sufficient evidence supported defendant's aggravated assault conviction, given that defendant had beaten the victim repeatedly while she was bound in such a position that she had to hold her head up in order not to choke, photographs depicted serious injuries to her face, head, and neck, and defendant threatened to kill her and talked about disposing of her body. *Reynolds v. State*, 2016 Ark. 214, 492 S.W.3d 491 (2016).

Conviction for aggravated residential burglary was reversed because there was insufficient evidence that defendant attempted to inflict a serious physical injury

under § 5-39-204(a)(2). Serious physical injury could be inflicted during a sexual assault, but under current Arkansas law, a sexual assault does not necessarily constitute a serious physical injury; even assuming that defendant did intend to sexually assault the victim, defendant's intention, combined with his grabbing her shoulder and causing a minor scratch to her baby's face, did not constitute a substantial step under § 5-3-201 toward inflicting a serious physical injury, as defined by this section. *Inskeep v. State*, 2016 Ark. App. 135, 484 S.W.3d 709 (2016).

Evidence was sufficient to show that a baby sustained a serious physical injury for purposes of § 5-13-201(a)(9) where the medical testimony described the skull fracture, the pain potentially caused by the subdural bleeding, and the greater risk of developing further complications. *Suchey v. State*, 2016 Ark. App. 225, 490 S.W.3d 320 (2016).

Evidence was sufficient to convict defendant of unlawful discharge of a firearm from a motor vehicle and battery as the victim suffered a serious physical injury. The victim testified that he received three gunshot wounds, was hospitalized, lost a kidney, and suffered further infections as a result of the wound; and the victim's injury caused protracted impairment of his health as the victim testified about the complications that resulted in infection and required him to return to the hospital, receive antibiotics, and have drainage tubes placed in his body. *Johnson v. State*, 2017 Ark. App. 71, 510 S.W.3d 298 (2017).

Cited: *Stalnaker v. State*, 2014 Ark. App. 412, 437 S.W.3d 700 (2014); *Coger v. State*, 2017 Ark. App. 466, 529 S.W.3d 640 (2017); *Wade v. State*, 2017 Ark. App. 157, 516 S.W.3d 772 (2017); *Caldwell v. State*, 2018 Ark. App. 588, 565 S.W.3d 539 (2018).

5-1-104. Territorial applicability.

CASE NOTES

Jurisdiction.

Where defendant was tried on alternate theories of capital murder—rape felony murder and child-abuse murder—and a general verdict form was used, and extraterritorial jurisdiction did not extend to the alleged rape that occurred in Missouri, the appellate court was unable to determine which theory the jury based the conviction on and therefore the conviction

was reversed. Although death was the consequence or result of the rape, rape is not defined to include death as a consequence, and thus, under the plain language of this section, extraterritorial jurisdiction did not extend to the alleged rape that occurred in Missouri. *Torres v. State*, 2019 Ark. 101, 571 S.W.3d 456 (2019).

5-1-108. Violations.

RESEARCH REFERENCES

Ark. L. Notes. Bryan Foster, *The Purpose of Criminal Evictions: Applying the Theories of Punishment to Arkansas'*

Criminal Eviction Statute, 2018 Ark. L. Notes 1993.

5-1-109. Statute of limitations.

(a)(1) A prosecution for the following offenses may be commenced at any time:

- (A) Capital murder, § 5-10-101;
- (B) Murder in the first degree, § 5-10-102;
- (C) Murder in the second degree, § 5-10-103;

(D) Rape, § 5-14-103, if the victim was a minor at the time of the offense;

(E) Sexual indecency with a child, § 5-14-110;

(F) Sexual assault in the first degree, § 5-14-124;

(G) Sexual assault in the second degree, § 5-14-125, if the victim was a minor at the time of the offense;

(H) Incest, § 5-26-202, if the victim was a minor at the time of the offense;

(I) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;

(J) Transportation of minors for prohibited sexual conduct, § 5-27-305;

(K) Employing or consenting to the use of a child in a sexual performance, § 5-27-402;

(L) Producing, directing, or promoting a sexual performance by a child, § 5-27-403; and

(M) Computer exploitation of a child in the first degree, § 5-27-605.

(2) A prosecution may be commenced for a violation of the following offenses, if, when the alleged violation occurred, the offense was committed against a minor, the violation has not been previously reported to a law enforcement agency or prosecuting attorney, and the victim has not reached the age of twenty-eight (28) years of age:

(A) Sexual assault in the third degree, § 5-14-126;

(B) Sexual assault in the fourth degree, § 5-14-127;

(C) Endangering the welfare of a minor in the first degree, § 5-27-205;

(D) Permitting abuse of a minor, § 5-27-221; and

(E) Computer child pornography, § 5-27-603.

(3) A prosecution for arson, § 5-38-301(a)(1)(G), may be commenced within ten (10) years after the offense was committed.

(b) Except as otherwise provided in this section, a prosecution for another offense shall be commenced within the following periods of limitation after the offense's commission:

(1)(A) Class Y felony or Class A felony, six (6) years.

(B) However, for rape, § 5-14-103, the period of limitation is eliminated if biological evidence of the alleged perpetrator is identified that is capable of producing a deoxyribonucleic acid (DNA) profile;

(2)(A) Except as provided in subdivision (b)(2)(B)(i) of this section, Class B felony, Class C felony, Class D felony, or an unclassified felony, three (3) years.

(B)(i) A prosecution may be commenced for a violation of § 23-66-502 as follows:

(a) Within three (3) years of completion of the last act taken to perpetrate alleged fraud; or

(b) Within five (5) years of any alleged violation of § 23-66-502 involving a motor vehicle purposely used to cause a motor vehicle accident for the purpose of filing an insurance claim.

(ii) If a prosecution could not be commenced within the time period prescribed by subdivision (b)(2)(B)(i) of this section because it was not reasonably possible to discover the alleged fraud at the time of the violation, the time period prescribed shall be extended for a period of three (3) years.

(iii) The period of limitation under this subdivision (b)(2)(B) may not extend more than ten (10) years after the date of the violation of § 23-66-502;

(3)(A) Misdemeanor or violation, one (1) year.

(B) However:

(i) For failure to notify by a mandated reporter in the first degree, § 12-18-201, and failure to notify by a mandated reporter in the second degree, § 12-18-202, the period of limitation is ten (10) years after the child victim reaches eighteen (18) years of age if the child in question was subject to child maltreatment; and

(ii) For a nine-point or greater violation of an Arkansas State Game and Fish Commission regulation or rule, the period of limitation is three (3) years; and

(4) Municipal ordinance violation, one (1) year unless a different period of time not to exceed three (3) years is set by ordinance of the municipal government.

(c) If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for:

(1) Any offense involving either fraud or breach of a fiduciary obligation, within one (1) year after the offense is discovered or should reasonably have been discovered by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself or herself not a party to the offense; and

(2)(A) Any offense that is concealed involving felonious conduct in office by a public servant at any time within five (5) years after he or she leaves public office or employment or within five (5) years after the offense is discovered or should reasonably have been discovered, whichever is sooner.

(B) However, in no event does this subdivision (c)(2) extend the period of limitation by more than ten (10) years after the commission of the offense.

(d) A defendant may be convicted of any offense included in the offense charged, notwithstanding that the period of limitation has expired for the included offense, if as to the offense charged the period of limitation has not expired or there is no period of limitation, and there is sufficient evidence to sustain a conviction for the offense charged.

(e)(1) For the purposes of this section, an offense is committed either when:

(A) Every element occurs; or

(B) If a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time the course of conduct or the defendant's complicity in the course of conduct is terminated.

(2) Time starts to run on the day after the offense is committed.

(f) A prosecution is commenced when an arrest warrant or other process is issued based on an indictment, information, or other charging instrument if the arrest warrant or other process is sought to be executed without unreasonable delay.

(g) The period of limitation does not run:

(1)(A) During any time when the accused is continually absent from the state or has no reasonably ascertainable place of abode or work within the state.

(B) However, in no event does this subdivision (g)(1) extend the period of limitation otherwise applicable by more than three (3) years; or

(2) During any period when a prosecution against the accused for the same conduct is pending in this state.

(h) If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for a violation of the following offenses if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the period prescribed in subsection (b) of this section has not expired since the victim has reached eighteen (18) years of age:

(1) Battery in the first degree, § 5-13-201;

(2) Battery in the second degree, § 5-13-202;

(3) Aggravated assault, § 5-13-204;

(4) Terroristic threatening in the first degree, § 5-13-301;

(5) Kidnapping, § 5-11-102;

(6) False imprisonment in the first degree, § 5-11-103;

(7) Permanent detention or restraint, § 5-11-106; and

(8) Criminal attempt, criminal solicitation, or criminal conspiracy to commit any offense listed in this subsection, §§ 5-3-201, 5-3-202, 5-3-301, and 5-3-401.

(i) If there is biological evidence connecting a person with the commission of an offense and that person's identity is unknown, the prosecution is commenced if an indictment or information is filed against the unknown person and the indictment contains the genetic information of the unknown person and the genetic information is accepted to be likely to be applicable only to the unknown person.

(j) When deoxyribonucleic acid (DNA) testing implicates a person previously identified through a search of the State DNA Data Base or National DNA Index System, a statute of limitation shall not preclude prosecution of the offense.

History. Acts 1975, No. 280, § 104; 1981, No. 620, § 1; A.S.A. 1947, § 41-104; Acts 1987, No. 484, § 1; 1987, No. 586, § 1; 2001, No. 920, § 1; 2001, No. 1780, § 2; 2003, No. 1087, § 8; 2003, No. 1390, § 1; 2005, No. 2250, § 1; 2009, No. 1444, § 1; 2011, No. 698, § 1; 2011, No. 1127,

§§ 1, 2; 2013, No. 144, § 1; 2013, No. 1086, § 1; 2015, No. 1009, § 1; 2017, No. 630, § 1; 2017, No. 695, § 1; 2019, No. 315, § 148.

Amendments. The 2015 amendment redesignated language in (b)(3)(B) as (b)(3)(B)(i); and added (b)(3)(B)(ii).

The 2017 amendment by No. 630 added (a)(3).

The 2017 amendment by No. 695 redesignated former (b)(2) as (b)(2)(A); added "Except as provided in subdivision

(b)(2)(B)(i) of this section" in (b)(2)(A); and added (b)(2)(B).

The 2019 amendment inserted "or rule" in (b)(3)(B)(ii).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Eliminating, Extending, or Tolling Statute of Limitations

for Sexual Offense When DNA Can Provide Identity of Alleged Perpetrator. 16 A.L.R.7th 7 (2015).

CASE NOTES

ANALYSIS

Commencement of Prosecution.
Continuing Crime.
Tolling the Statute.

Commencement of Prosecution.

Circuit court did not err in dismissing the charge of theft of property by deception under § 5-36-103(a)(2) as barred by the statute of limitations because, contrary to the State's contention, the offense did not constitute a continuing offense. Defendant knowingly obtained the victim's property by deception, with the purpose of depriving the victim of the property, when the victim made wire transfers into an account controlled by defendant. Therefore, the statute of limitations began to run with the transfers and the limitations period expired before the prosecution commenced. *State v. Gray*, 2016 Ark. 411, 505 S.W.3d 160 (2016).

Trial court erred in its interpretation of this section and its conclusion that the prosecution of the misdemeanor negligent-homicide case had not commenced within the applicable limitations period; although the charging documents were

filed after the limitations period, the arrest warrant was issued within the limitations period. *State v. Ledwell*, 2017 Ark. 252, 526 S.W.3d 1 (2017).

Because the State did not file charges for sexual abuse in the fourth degree against defendant within three years of the alleged victim's eighteenth birthday pursuant to a former version of this section, reversal of the judgment as to those charges and dismissal of defendant's convictions was mandated. *Bynum v. State*, 2017 Ark. App. 41, 511 S.W.3d 860 (2017).

Continuing Crime.

Theft by deception under § 5-36-103(a)(2) is generally not a continuing offense. *State v. Gray*, 2016 Ark. 411, 505 S.W.3d 160 (2016).

Tolling the Statute.

Both the felony negligent-homicide charge and the manslaughter charge arose out of a single action, defendant striking the victim with her car, and thus the filing of the felony negligent-homicide charge tolled the statute of limitations. *Blackwell v. State*, 2015 Ark. App. 96, 455 S.W.3d 848 (2015).

5-1-110. Conduct constituting more than one offense — Prosecution.

CASE NOTES

ANALYSIS

Applicability.
Instructions.

Lesser-Included Offenses.
Multiple Convictions.
Review.
Separate Acts.

Writ of Error Coram Nobis.

Applicability.

Trial court did not err in denying defendant's post-conviction motion to dismiss his first-degree battery conviction based on double jeopardy because separate convictions and sentences for criminal attempt to commit murder in the first degree were statutorily authorized, each gunshot wound that defendant inflicted on the victim constituted a separate battery, battery was not a continuing course of conduct, and multiple crimes committed on a single episode could be separately punished. *Copeland v. State*, 2013 Ark. App. 747 (2013).

Instructions.

Where a defendant appealed his conviction for first-degree battery, a trial court abused its discretion in failing to instruct the jury on third-degree battery since there was some evidence to support such an instruction. The defendant testified that he did not mean to drop the infant on her head and that it was an accident, and an expert offered his opinion that a baby's skull could be fractured by a fall such as the one described by the defendant. *Washington v. State*, 2014 Ark. App. 122 (2014).

Lesser-Included Offenses.

In a theft trial, it was not necessary to instruct the jury on the lesser-included offense of attempted theft because defendant clearly exercised unauthorized control over a store's property when he threw it over a fence into an area off the store's parking lot; it was not necessary that defendant also "take" the property to complete the crime. *Cole v. State*, 2013 Ark. App. 492 (2013).

Circuit court did not abuse its discretion when it declined defendant's request to include a lesser-included-offense jury instruction for second-degree sexual assault; second-degree sexual assault is not a lesser-included offense of rape because it requires proof of two elements that rape does not: defendant's age (18 or over) and defendant's marital status (not married to the victim). *Hartman v. State*, 2015 Ark. 30, 454 S.W.3d 721 (2015).

Circuit court's decision to revoke defendant's probation based on his committing the crime of manufacturing methamphetamine was not in error; although the evidence was insufficient to show that defen-

dant committed that offense, it was sufficient to support the offense of attempting to manufacture methamphetamine. *Atteberry v. State*, 2016 Ark. App. 331 (2016).

In a robbery case in which several witnesses testified that defendant shoved a store employee out of the way and swung at another store employee while trying to flee with a money bag, the trial court did not err in denying defendant's request that the jury be instructed on theft as a lesser-included offense of robbery. *Cartwright v. State*, 2016 Ark. App. 425, 501 S.W.3d 849 (2016).

Theft is not a lesser-included offense of robbery pursuant to subsection (b) of this section. The wrongful appropriation of the victim's property is an essential element of theft, while robbery can be committed without actually taking the property of another, since robbery is defined as employing or threatening to employ physical force upon another with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter. *Cartwright v. State*, 2016 Ark. App. 425, 501 S.W.3d 849 (2016).

Defendants' argument that the firearm-enhancement statute was a lesser-included offense of any crime for which use of a firearm was an element, thereby making their sentences for the underlying felonies and the firearm enhancements illegal, was unpreserved for review because it was not properly framed as a challenge to an illegal sentence; the argument was a double-jeopardy challenge, and it had already been directly addressed and rejected. *Anderson v. State*, 2017 Ark. App. 300 (2017).

While the juvenile was charged with second-degree terroristic threatening and the circuit court in effect sua sponte amended the charge when it found the juvenile guilty of second-degree assault, and second-degree assault is not a lesser-included offense of second-degree terroristic threatening, the juvenile failed to raise the due process issue at the circuit court level and therefore failed to preserve the issue for appellate review. *I.K. v. State*, 2018 Ark. App. 584, 564 S.W.3d 579 (2018).

Revocation of defendant's suspended sentence was appropriate; even though the evidence did not establish any physical injury to the victim to support the

allegation of second-degree battery on a law enforcement officer under § 5-13-202, the Court of Appeals without invitation held that the evidence was sufficient to support the lesser-included offense of second-degree assault under § 5-13-206. *Caldwell v. State*, 2018 Ark. App. 588, 565 S.W.3d 539 (2018).

Multiple Convictions.

Since the underlying felony for the first-degree murder charge was robbery, it was proper for defendant to be sentenced on the first-degree murder conviction and its underlying felony of robbery and the trial court erred in imposing a sentence for aggravated robbery. *Thompson v. State*, 2015 Ark. 271 (2015).

Circuit court properly denied defendant's petition for writ of habeas corpus because a conviction under § 5-27-602(a)(1) for each photograph sent by defendant did not violate double jeopardy, even though he sent only one email with one attachment. The number of charges brought against defendant was authorized by the legislature, defendant did not dispute that the email he sent contained 30 separate photographs depicting children engaging in sexually explicit conduct, and, although "computer file" is included in the list of media in § 5-27-602(a)(1), the fact that the 30 photographs were attached to the email in a single file was not relevant where it is the number of photographs distributed, not the manner of distribution, that gives rise to the number of permissible charges. *Pelletier v. Kelley*, 2018 Ark. 347, 561 S.W.3d 730 (2018).

Review.

Defendant failed to preserve his double-jeopardy argument for appellate review because he failed to raise the argument after the jury had returned its guilty verdicts. *Sheppard v. State*, 2014 Ark. App. 206 (2014).

Court of Appeals lacked jurisdiction to consider defendant's interlocutory appeal because his notice of appeal was untimely; the circuit court's denial of defendant's motion to dismiss was necessarily a denial of his *res judicata* arguments, and thus, the dismissal order was the one from which defendant should have filed his notice of appeal. *Shaver v. State*, 2018 Ark. App. 242, 548 S.W.3d 222 (2018).

Separate Acts.

Prosecutor explained there were three aggravated assaults, plus the prosecutor identified the injuries the victim suffered from defendant's actions, and these were separate acts resulting from separate impulses, even though they happened during the same criminal episode, and they constituted distinct acts, such that the trial court did not err in denying the motion to dismiss. *Rodriguez v. State*, 2014 Ark. App. 660, 449 S.W.3d 306 (2014).

Writ of Error Coram Nobis.

Double-jeopardy claims do not fall within any of the four categories of recognized claims for a writ of error coram nobis. *Pelletier v. State*, 2015 Ark. 432, 474 S.W.3d 500 (2015).

Cited: *Rea v. State*, 2015 Ark. 431, 474 S.W.3d 493 (2015).

5-1-111. Burden of proof — Defenses and affirmative defenses — Presumption.

CASE NOTES

ANALYSIS

Defenses.
Jurisdiction.
Statute of Limitations.

Defenses.

Circuit court did not abuse its discretion in denying defendant's motion for acquit-

tal based on lack of capacity because the circuit court was confronted with conflicting forensic evaluations, and the existence of conflicting proof and the consequent questions of fact that arose from the conflicts supported the circuit court's discretionary decision to deny defendant's motion for acquittal. *Russell v. State*, 2013 Ark. 369 (2013).

Substantial evidence existed to support a second-degree murder conviction because defendant's justification defense could have been reasonably rejected; the jury could have credited testimony indicating that defendant walked towards the victim holding a gun after being told that the girls present did not want to fight. *Moody v. State*, 2014 Ark. App. 538, 444 S.W.3d 389 (2014).

Jurisdiction.

In a case where defendant was convicted of second-degree sexual assault, a lesser-included offense of rape, the circuit court did not err in finding that it had jurisdiction because the victim and her brother identified photographs of the trailer and the bed in the back room as the place where the sexual acts took place; there was simply no evidence that the rape occurred in Garland County, where the children were interviewed, or in any location other than the trailer where they lived with their father; and a presumption was created in favor of jurisdiction in Saline County where the charge was filed by the State as there was no positive evidence that the act occurred outside of Saline County. *Lewis v. State*, 2016 Ark. App. 257, 492 S.W.3d 538 (2016).

State was not required to prove jurisdiction when defendant was accused of two counts of sexual assault; there was no positive evidence that the crime occurred outside the jurisdiction of the trial court. While separate and distinct criminal conduct may have occurred in Hot Springs and Tulsa, that did not mean that affirmative proof was established that the trial court lacked jurisdiction over defendant's convictions for sexual assaults that occurred in his home. *Bynum v. State*, 2017 Ark. App. 41, 511 S.W.3d 860 (2017).

Defendant's lack of jurisdiction argument failed where he never presented the trial court with any affirmative evidence that the crime took place outside of the county. *Bates v. State*, 2017 Ark. App. 123, 516 S.W.3d 275 (2017).

Statute of Limitations.

Charges against defendant, including rape, were not time-barred, even under a three-year statute of limitations, because the amended information on its face alleged that the offenses occurred within the applicable time period; moreover, a victim testified that defendant touched her inappropriately in April 2011. *Dowdy v. State*, 2015 Ark. 35 (2015).

5-1-112. Affirmative defense — Former prosecution for same offense.

CASE NOTES

Consent of Defendant to Termination.

In a case where defendant and his son were tried together, because defendant expressly requested the trial court to grant a mistrial, that request obviated the need to demonstrate an overruling necessity in order to avoid a claim of double jeopardy, and the state constitutional double jeopardy provision did not impose an affirmative duty on the trial court to determine if the jury was divided on defendant's guilt or innocence. *Turner v. State*, 2013 Ark. App. 754 (2013).

Defendant requested a continuance, which was granted, then the trial court sua sponte declared a mistrial, and defense counsel acquiesced; thus, defendant expressly consented to the mistrial and the trial court correctly found that double jeopardy had not attached. *Hoey v. State*, 2017 Ark. App. 253, 519 S.W.3d 745 (2017).

Cited: *Cohns v. State*, 2017 Ark. App. 177, 516 S.W.3d 789 (2017).

5-1-113. Affirmative defense — Former prosecution for different offense.

CASE NOTES

Issue Preclusion.

Court of Appeals lacked jurisdiction to consider defendant's interlocutory appeal because his notice of appeal was untimely; the circuit court's denial of defendant's motion to dismiss was necessarily a denial

of his res judicata arguments, and thus, the dismissal order was the one from which defendant should have filed his notice of appeal. *Shaver v. State*, 2018 Ark. App. 242, 548 S.W.3d 222 (2018).

CHAPTER 2

PRINCIPLES OF CRIMINAL LIABILITY

SUBCHAPTER.

2. CULPABILITY.

3. MENTAL DISEASE OR DEFECT.

6. JUSTIFICATION.

SUBCHAPTER 2 — CULPABILITY

SECTION.

5-2-204. Elements of culpability — Ex-

ceptions to culpable mental state requirement.

Effective Dates. Acts 2015 (1st Ex. Sess.), No. 6, § 7: May 29, 2015. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the Supreme Court of Arkansas held in *Leeka v. State*, 2015 Ark. 183 (2015), that in order to sustain a conviction for driving while intoxicated, the state must prove that the defendant had a reckless mental state despite the statute not expressly requiring that the defendant's mental state be proven; that the General Assembly intended and still intends to keep driving while intoxicated a strict liability offense requiring no culpable mental state; that the General Assembly passed and the Governor signed Act No. 299 during the 2015 Regular Session which amended § 5-65-103 by combining the offenses of driving while intoxicated and boating while intoxicated; that Act 299 also amended § 5-65-303 by combining the offenses of underage driving under the influence and underage boating under the influence; that Act No. 299 does not become effective until July 22, 2015; that the new offenses of driving and boating while

intoxicated and driving or boating under the influence while underage are strict liability offenses requiring no culpable mental state; that Sections 2, 3, and 5 of this act are necessary because the offenses of driving while intoxicated and underage driving under the influence should not have an applicable culpable mental state as they are strict liability offenses; and that Sections 4 and 6 of this act are necessary because the offenses of driving or boating while intoxicated and underage driving or boating under the influence should not have an applicable culpable mental state as they are strict liability offenses. Therefore, an emergency is declared to exist, and:

"(1) Sections 2, 3, and 5 of this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

"(A) The date of its approval by the Governor;

"(B) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

“(C) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto; and

“(2) Sections 4 and 6 of this act being

necessary for the preservation of the public peace, health, and safety shall become effective on July 22, 2015.”

5-2-202. Culpable mental states — Definitions.

CASE NOTES

ANALYSIS

Evidence.

Intent.

Knowingly.

Negligently.

Purposely.

Recklessly.

Evidence.

Evidence was sufficient to support defendant's conviction of promoting prostitution in the first degree, § 5-70-104, where the State presented substantial evidence of circumstances through the testimony of the four witnesses from which the circuit court could infer that defendant knowingly advanced or profited from the prostitution of a person less than 18 years of age. *Tatum v. State*, 2014 Ark. App. 68 (2014).

Intent.

There was substantial evidence from which the jury could have inferred that it was defendant's conscious object to cause the victim's death, because defendant placed the gun less than one inch away from her head and pulled the trigger, killing her. *Williamson v. State*, 2013 Ark. 347, 429 S.W.3d 250 (2013).

Knowingly.

Evidence was sufficient to support a conviction for theft by deception because defendant entered into a scheme to defraud by inflating a tax refund amount and then diverting the difference to an account she owned; there was substantial evidence that defendant knowingly obtained the property of another by deception. The taxpayer did not agree to have any of her refund deposited into any other account, and defendant was not forthcoming with information about the separate account, despite the taxpayer's multiple inquiries. *McClellan v. State*, 2014 Ark. App. 725, 452 S.W.3d 116 (2014).

In a first-degree murder case, the trial court did not abuse its discretion in instructing the jury on the lesser-included offense of second-degree murder because the evidence provided a rational basis for an acquittal on the first-degree-murder charge and a conviction on the second-degree-murder charge as defendant did not shoot and kill the victim, but handed his gun to codefendant; defendant could not have known with absolute certainty what codefendant would do; and the jury could have concluded that defendant knowingly caused the death of another person under circumstances manifesting extreme indifference to the value of human life in that he was practically certain that his conduct would cause the death of the victim. *Northern v. State*, 2015 Ark. App. 426, 467 S.W.3d 755 (2015).

Evidence supported defendant's convictions of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child under § 5-27-602; there was substantial evidence that defendant exercised dominion and control over the computers that were seized from his residence, and there was no claim that anyone else lived with defendant or had access to the computer, and there was substantial evidence that defendant knowingly possessed the images and videos of child pornography saved on his computer. *Bishop v. State*, 2015 Ark. App. 436, 467 S.W.3d 763 (2015).

In a second-degree murder case, defendant's motion for a directed verdict was properly denied as a jury could find that the defense of justification was without merit because defendant's conduct of intentionally firing eight warning shots at the victim established extreme indifference to human life; the simple act of pointing a loaded gun at the victim was enough to satisfy the intent standard of second-degree murder; and defendant was

not justified in using deadly force against the victim as he initiated the situation that brought about his use of deadly force, evidence at the crime scene did not support defendant's assertion that he was backing up when firing shots, and an eyewitness testified that the victim never charged at defendant. *Sullivan v. State*, 2015 Ark. App. 514, 470 S.W.3d 312 (2015).

Evidence was sufficient to sustain the jury's finding that defendant acted knowingly and with extreme indifference to the value of human life where defendant was alone with the baby for approximately two hours, the baby developed a deformed head by the time the mother arrived home, defendant packed a bag and insisted on driving his own vehicle to the hospital, and defendant initially claimed that nothing had happened and then offered two improbable explanations for how the baby's skull had been fractured. *Suchey v. State*, 2016 Ark. App. 225, 490 S.W.3d 320 (2016).

Negligently.

Negligent homicide instruction was not warranted because there was no rational basis to conclude that defendant's actions were merely negligent where defendant reached under his car seat, chambered a round, and intentionally fired the weapon directly at the victim's chest. *Bennett v. State*, 2014 Ark. App. 624, 447 S.W.3d 602 (2014).

Circuit court erred in denying defendant's motion to dismiss a negligent homicide charge under § 5-10-105(b)(1); although there was no question that defendant's failure to see the decedent's vehicle resulted in the fatal accident, there was no evidence that defendant was speeding, driving erratically, under the influence of alcohol, using a phone, or engaged in some similar conduct, and thus, the evidence fell short of establishing criminal negligence. *Gill v. State*, 2015 Ark. 421, 474 S.W.3d 77 (2015).

Substantial evidence supported defendant's conviction of misdemeanor negligent homicide; the weather conditions were clear on the night in question, defendant was observed crossing five lanes of traffic at high speed and rolling his vehicle, the vehicle's black box indicated that the brakes were never engaged, plus three cans of air duster had been pur-

chased minutes before the accident and a blood sample had detected the presence of difluoroethane, a gas found in air-duster canisters, in defendant's blood. *Sizemore v. State*, 2015 Ark. App. 728, 478 S.W.3d 281 (2015).

It was not clear that the administrative law judge (ALJ) incorrectly relied on the criminal-negligence standard; however, the father could not show prejudice because applying the criminal-negligence standard only heightened the standard by which the ALJ could find neglect by inadequate supervision under the Child Maltreatment Act, § 12-18-103. *W.N. v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 346, 552 S.W.3d 483 (2018).

Purposely.

Record contained substantial evidence that defendant had the intent to commit the crime of terroristic threatening, as he made statements that he would destroy anyone who got in his way, and he tried to call his father to talk him out of "it," and this particular statement was made after defendant loaded or cocked a rifle while pacing; taken in context, the statements were not innocuous, but given the parties' volatile relationship, gave rise to the level sufficient to support a conviction of terroristic threatening. *Cauffiel v. State*, 2013 Ark. App. 642 (2013).

Circuit court did not err in denying defendant's motion for directed verdict on a first-degree murder charge where defendant lied about seeing the victim, had buried her body, and had disposed of a necktie and bag, and thus, the jury could have concluded from the testimony and circumstantial evidence that he had placed a bag over the victim's head with the purpose of causing her death. *Williams v. State*, 2015 Ark. 316, 468 S.W.3d 776 (2015).

While there was evidence of the defendant's history of mental difficulties, there was sufficient evidence that she was not acting with such difficulties at the time of the murder; in addition to defendant's deliberate acts after the murder to conceal evidence, law enforcement officers testified that they had clear conversations with the 17-year-old defendant the day of the murder and her mother testified that she was calm immediately before the murder. While the State did not offer a motive for the murder, the jury could reasonably

infer from this evidence that defendant purposely killed the victim. *Fink v. State*, 2015 Ark. 331, 469 S.W.3d 785 (2015).

Defendant was properly found guilty of first-degree murder because she purposely caused the 80-year-old victim's death by stabbing him approximately 36 times, deliberately sought to conceal evidence, and the jury was entitled to believe the testimony of one expert over the other and to find that defendant had not proved the defense of mental disease or defect by a preponderance of the evidence. *Fink v. State*, 2015 Ark. 331, 469 S.W.3d 785 (2015).

Evidence presented was substantial enough that the jury did not have to resort to conjecture to convict defendant of first-degree murder, given in part that witnesses testified that defendant and the victim had been fighting, and although defendant claimed self-defense, the victim was shot in the head, which supported the idea that the victim was shot intentionally, not during a struggle for defendant's life. *Toombs v. State*, 2015 Ark. App. 71, appeal dismissed, 2015 Ark. 471 (2015).

Defendant acted with the purpose to cause the victim's death in that defendant, instead of leaving when defendant's paramour became angry and intoxicated, retrieved a handgun, hid it under a sofa cushion beside defendant, and shot defendant's paramour, after the paramour threw a cup of wine at defendant, when the paramour was in a vulnerable position reclined in the paramour's chair. *Scott-Paxson v. State*, 2015 Ark. App. 149, 457 S.W.3d 311 (2015).

Substantial evidence supported defendant's conviction for residential burglary because the circumstances were plainly sufficient to allow the trial court to reasonably infer, without resort to speculation or conjecture, that he entered the victim's home with the purpose of assaulting her; defendant violently broke into the victim's home, chased her, tried to prevent her from being able to call for help, verbally threatened her safety, and immediately thereafter physically beat her. *Davis v. State*, 2015 Ark. App. 234, 459 S.W.3d 821 (2015).

It was defendant's brother who fired the shot that killed the victim, and although defendant claimed the State failed to prove it was his conscious object to assist his brother, the law in Arkansas made no

distinction between the criminal liability of a principal and an accomplice; defendant drove around with the stated purpose to assist in hunting down and killing the victim, and thus the evidence supported his convictions of first-degree murder and committing a terroristic act, and the circuit court properly denied his motions for directed verdict. *Starling v. State*, 2015 Ark. App. 429, 468 S.W.3d 294 (2015).

State produced sufficient evidence that defendant purposely killed the victim; it was defendant's conscious object to end the victim's life, given that even after defendant had beaten the victim with a bat for several minutes, and the victim begged her to stop, she did not stop, she made efforts to conceal the crime, including burying the victim's body, and she fled when investigators found the body. *Rolf v. State*, 2015 Ark. App. 520, 472 S.W.3d 490 (2015).

Trial court did not err in denying appellant's motion for a directed verdict on an aggravated assault charge where, after realizing that he would be unable to escape from two police officers pursuing him, he turned towards one officer and held a knife in a threatening manner, the officer was able to strike appellant with his baton and take away the knife, and thus, appellant was close enough to the officer to cause serious physical injury. *Freeman v. State*, 2016 Ark. App. 36, 480 S.W.3d 886 (2016).

Evidence was sufficient to convict defendant of first-degree murder because, after stabbing the victim, defendant immediately started trying to cover up evidence when she hid the knife and returned asking another individual what happened; defendant lied to the police during her first interview about her involvement; lying about a crime could indicate a consciousness of guilt, and a jury could properly consider an attempt to cover up one's connection to a crime as proof of a purposeful mental state; and, contrary to defendant's statement to police that she barely swung the knife, the medical examiner testified that the blade had gone halfway through the victim's body. *Stearns v. State*, 2017 Ark. App. 472, 529 S.W.3d 654 (2017).

Recklessly.

Suspension of an earlier sentence was properly revoked because defendant com-

mitted domestic battery in the third degree where an infant child suffered an arm fracture in defendant’s care, and a medical examination revealed healing fractures other places; moreover, there was evidence that other injury incidents had occurred while the child was in defendant’s care, and there was testimony that defendant was too rough with the child. The standard for reckless was what a reasonable person in the circumstances would have observed. *Singletary v. State*, 2013 Ark. App. 699 (2013).

Trial court did not err by failing to instruct on attempted reckless manslaughter as a lesser-included offense of attempted second-degree murder because the crime of attempted reckless manslaughter is inherently contradictory. The attempted offense involved an intentional act, and it would have been illogical to ask the jury to find that defendant intended to act recklessly or that he purposely engaged in conduct that was a substantial step in a course of conduct intended to culminate in acting recklessly. Even if the instruction was based on sound law, there was no rational basis for giving it in this case where defendant’s actions in running over people were intentional, regardless of whether he intended to bring about the particular result of death. *Allen v. State*, 2015 Ark. App. 360, 465 S.W.3d 9 (2015).

Circuit court, which instructed the jury on first-degree murder and the lesser-included offense of second-degree murder,

did not err in refusing to instruct the jury on reckless manslaughter because the jury was presented with evidence that defendant chased the victim, blocked the victim’s vehicle with defendant’s vehicle, and ran up to the victim’s car, shooting once into the hood of the car and a second time through the windshield of the car, killing the victim. *Starling v. State*, 2016 Ark. 20, 480 S.W.3d 158 (2016).

Trial court did not err in instructing the jury because, even assuming endangering the welfare of a minor in the third degree was a lesser-included offense of endangering the welfare of a minor in the first degree, there was not a rational basis for giving the instruction. By defendant’s own testimony, defendant’s actions were not reckless; they were actions that defendant purposely undertook after defendant became upset and frustrated when an infant child would not stop crying, which resulted in serious injury to the child. *Myers v. State*, 2016 Ark. App. 501, 505 S.W.3d 694 (2016).

Cited: *Adams v. State*, 2014 Ark. App. 308, 435 S.W.3d 520 (2014); *Edwards v. State*, 2015 Ark. 377, 472 S.W.3d 479 (2015); *Fowler v. State*, 2015 Ark. App. 579, 474 S.W.3d 120 (2015); *Ta v. State*, 2015 Ark. App. 220, 459 S.W.3d 325 (2015); *Edwards v. State*, 2017 Ark. 207 (2017); *Campbell v. State*, 2017 Ark. App. 340, 525 S.W.3d 465 (2017); *Turner v. State*, 2018 Ark. App. 5, 538 S.W.3d 227 (2018).

5-2-203. Culpable mental states — Interpretation of statutes.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments: Felony Conviction for Recklessly Violating the State’s Drug-and-Paraphernalia-Pos-

session Laws Does Not Prevent Readmission to the Arkansas Bar, 66 Ark. L. Rev. 601 (2013).

CASE NOTES

ANALYSIS

Purposely.
Requirement and Establishment.

Purposely.

Defendant was properly convicted of second-degree assault against a family member because there was substantial evidence that he entered the victim’s

home with the purpose of assaulting her. *Davis v. State*, 2015 Ark. App. 234, 459 S.W.3d 821 (2015).

Requirement and Establishment.

Circuit court erred in ruling that the Omnibus DWI Act of 1983 is a strict liability statute that does not require proof of a culpable mens rea. As the DWI statute, codified at § 5-65-103, does not

prescribe a culpable mental state, a culpable mental state has to be imputed to the offense through the plain language of this section; and the offense is not subject to the statutory exception in § 5-2-204(c)(2) because the offense is included in the Criminal Code. *Leeka v. State*, 2015 Ark. 183, 461 S.W.3d 331 (2015) (decision under prior law).

Circuit court erred in concluding that § 5-64-411 does not require a culpable mental state. Section 5-64-411 adds an enhanced sentence for a person found guilty of certain offenses, including that for which appellant was convicted, only if an additional requirement is met, i.e., the location where the act was committed;

thus, § 5-64-411 defines an offense. *Small v. State*, 2018 Ark. App. 80, 543 S.W.3d 516 (2018).

Because a circuit court erred in ruling that a sentencing-enhancement offense under § 5-64-411, for delivery of hydrocodone within 1,000 feet of a church, did not require a culpable mental state and improperly instructed the jury, reversal and remand were required; a culpable mental state is imputed under this section when the statute defining an offense does not prescribe a culpable mental state. *Silmon v. State*, 2018 Ark. App. 388, 557 S.W.3d 266 (2018).

Cited: *French v. State*, 2018 Ark. App. 502, 563 S.W.3d 582 (2018).

5-2-204. Elements of culpability — Exceptions to culpable mental state requirement.

(a) A person does not commit an offense unless his or her liability is based on conduct that includes a voluntary act or the omission to perform an act that he or she is physically capable of performing.

(b) A person does not commit an offense unless he or she acts with a culpable mental state with respect to each element of the offense that requires a culpable mental state.

(c) However, a culpable mental state is not required if:

(1) The offense is a violation unless a culpable mental state is expressly included in the definition of the offense;

(2) An offense defined by a statute not a part of the Arkansas Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any element of the offense; or

(3) The offense is defined as a strict liability offense.

History. Acts 1975, No. 280, § 202; A.S.A. 1947, § 41-202; Acts 2015 (1st Ex. Sess.), No. 6, § 2.

A.C.R.C. Notes.

Acts 2015 (1st Ex. Sess.), No. 6, § 1, provided: “Legislative intent.

“(a) It is the intent of the General Assembly with this act to address the Supreme Court’s holding in *Leeka v. State*, 2015 Ark. 183 (2015), that the state must prove a culpable mental state in a prosecution for driving while intoxicated.

“(b) The General Assembly intends for this act to establish that the current of-

fenses of driving while intoxicated and underage driving under the influence, as well as the offenses of driving or boating while intoxicated and driving or boating under the influence while underage that were created by Acts 2015, No. 299, § 6, be strict liability offenses, which are offenses that require no culpable mental state be proven.”

Amendments. The 2015 (1st Ex. Sess.) amendment added (c)(3).

CASE NOTES

ANALYSIS

Child Maltreatment Act.

Exceptions to Culpable Mental State Requirement.

Child Maltreatment Act.

Neglect by inadequate supervision does not require a culpable mental state because it is defined in the Child Maltreatment Act, § 12-18-103, outside of the Arkansas Criminal Code. *W.N. v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 346, 552 S.W.3d 483 (2018).

In a Child Maltreatment Act case involving the death of a child who was left in a car seat on a hot day, it was not clear that the administrative law judge (ALJ) incorrectly relied on the criminal-negligence standard; however, the father could not show prejudice because applying the criminal-negligence standard only height-

ened the standard by which the ALJ could find neglect by inadequate supervision under the Child Maltreatment Act. *W.N. v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 346, 552 S.W.3d 483 (2018).

Exceptions to Culpable Mental State Requirement.

Circuit court erred in ruling that the Omnibus DWI Act of 1983 is a strict liability statute that does not require proof of a culpable mens rea. As the DWI statute, codified at § 5-65-103, does not prescribe a culpable mental state, a culpable mental state has to be imputed to the DWI offense through the plain language of § 5-2-203; and the offense is not subject to the statutory exception in subdivision (c)(2) of this section because the offense is included in the Criminal Code. *Leeka v. State*, 2015 Ark. 183, 461 S.W.3d 331 (2015) (decision under prior law).

5-2-205. Causation.

CASE NOTES

Death.

State produced sufficient evidence that defendant caused the victim's death; although the expert testimony left open possible concurrent causes for the victim's death, the skull injury clearly contributed to his death, defendant was the only person to hit the victim with the aluminum bat, and the victim's blood was found on the bat. *Rollf v. State*, 2015 Ark. App. 520, 472 S.W.3d 490 (2015).

Sufficient evidence supported defendant's conviction for second-degree murder; while the concurrent causes—the surgical complications, ensuing epidural hematoma, and pneumonia—might have contributed to the victim's death, defendant's conduct in beating and kicking the victim in the head, thereby causing the initial subdural hematoma, was the cause of his death. *Claggett v. State*, 2019 Ark. App. 208, 575 S.W.3d 169 (2019).

5-2-207. Intoxication.

CASE NOTES

Specific Intent.

Sufficient evidence supported the prosecutor's decision to charge appellant with capital murder; although defendant had no recollection of the events leading to his

girlfriend's death, intent could be inferred from the nature and extent of the injuries that caused her death. *True v. State*, 2017 Ark. 323, 532 S.W.3d 70 (2017).

5-2-209. Entrapment.**RESEARCH REFERENCES**

ALR. Entrapment to Commit Federal Crimes of Terrorism. 89 A.L.R. Fed. 2d 215 (2014).

CASE NOTES**ANALYSIS**

Evidence.

Failure to Raise.

Question of Law or Fact.

Evidence.

Defendant could not demonstrate any prejudice from the trial court's order granting the State's motion to prohibit him from attacking the credibility of a criminal informant because the jury heard, through the informant's own testimony, that the informant had an extensive criminal history; although it could make a would-be criminal more likely to trust an informant who had a reputation, that was not the same thing as inducing one to act through persuasion. *Owens v. State*, 2017 Ark. App. 109, 515 S.W.3d 625 (2017).

Failure to Raise.

Trial court did not err in denying post-conviction relief where appellant con-

tended that trial counsel was ineffective for failing to raise a defense of entrapment and for not having the jury instructed on that defense; counsel explained her reasons for not pursuing an inconsistent defense to what she believed was a relatively strong innocence defense, and even if appellant was entitled to an instruction on entrapment, counsel was not ineffective simply for failing to request it. *Flemons v. State*, 2016 Ark. 460, 505 S.W.3d 196 (2016).

Question of Law or Fact.

Trial court did not err in denying defendant's motions for a directed verdict on the ground of entrapment where there were factual issues to be decided by the jury as to whether the conduct of law enforcement would have caused a law-abiding citizen to commit internet stalking of a child. *Squyres v. State*, 2015 Ark. App. 665, 476 S.W.3d 839 (2015).

SUBCHAPTER 3 — MENTAL DISEASE OR DEFECT**SECTION.**

5-2-301. Definitions.

5-2-304. Notice requirement.

5-2-305. [Repealed.]

5-2-307. Admissibility of statements made during examination or treatment.

5-2-308. Expert witnesses — Mental health examiner.

5-2-309. Determination of fitness to proceed.

5-2-310. Lack of fitness to proceed — Procedures subsequent to finding.

5-2-312. Lack of criminal responsibility — Affirmative defense.

5-2-313. Acquittal based on lack of criminal responsibility report.

SECTION.

5-2-314. Acquittal — Examination of defendant — Hearing.

5-2-315. Discharge or conditional release.

5-2-316. Conditional release — Subsequent discharge, modification, or revocation.

5-2-317. Jurisdiction and venue.

5-2-327. Examination of defendant — Fitness to proceed.

5-2-328. Examination of defendant — Affirmative defense of lack of criminal responsibility.

5-2-329. Data to be maintained by the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services.

SECTION.

5-2-330. Examination by Division of Correction prohibited.

5-2-331. Cost of mental health services,

examination, and treatment of defendant.

Effective Dates. Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled ‘Funding and

classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-2-301. Definitions.

As used in this subchapter:

(1) “Appropriate facility” means any facility within or without this state to which a defendant is eligible for admission and treatment for mental disease or defect;

(2) “Compliance monitor” means either a social service representative or licensed social worker, or both, employed by the Department of Human Services for the purpose of, including, but not limited to:

(A) Verifying that a person conditionally released pursuant to a provision of this subchapter is in compliance with the conditions for release;

(B) Providing social service assistance to a person conditionally released pursuant to a provision of this subchapter; and

(C) Reporting compliance with the conditions for release or lack of compliance with the conditions for release to the appropriate circuit court;

(3) “Designated receiving facility or program” means an inpatient or outpatient treatment facility or program that is designated within each geographic area of the state by the Director of the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services to accept the responsibility for the care, custody, and treatment of a person involuntarily admitted to the state mental health system;

(4) “Expert” means a qualified psychiatrist or a qualified psychologist;

(5) “Frivolous” means clearly lacking any basis in fact or law;

(6) “Lack of criminal responsibility” means that due to a mental disease or defect a defendant lacked the capacity at the time of the alleged offense to either:

(A) Appreciate the criminality of his or her conduct; or

(B) Conform his or her conduct to the requirements of the law;

(7)(A) “Mental disease or defect” means a:

(i) Substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life;

(ii) State of significantly subaverage general intellectual functioning existing concurrently with a defect of adaptive behavior that developed during the developmental period; or

(iii) Significant impairment in cognitive functioning acquired as a direct consequence of a brain injury or resulting from a progressively deteriorating neurological condition.

(B) As used in the Arkansas Criminal Code, “mental disease or defect” does not include an abnormality manifested only by:

(i) Repeated criminal or otherwise antisocial conduct;

(ii) Continuous or noncontinuous periods of intoxication, as defined in § 5-2-207(b)(1), caused by a substance such as alcohol or a drug; or

(iii) Dependence upon or addiction to any substance such as alcohol or a drug;

(8) “Prescribed regimen of medical, psychiatric, or psychological care or treatment” means care or treatment for a mental illness, as defined in § 20-47-202;

(9) “Qualified psychiatrist” means a licensed psychiatrist who has successfully completed or is currently participating in a post-residency fellowship in forensic psychiatry accredited by the American Board of Psychiatry and Neurology, Inc., or has successfully completed a forensic certification course approved by the department, and who is currently approved by the department to administer a forensic examination as defined in this subchapter;

(10) “Qualified psychologist” means a licensed psychologist who has successfully completed or is currently participating in a formal post-doctoral fellowship training program in forensic psychology or has successfully completed a forensic certification course approved by the department, and who is currently approved by the department to administer a forensic examination as defined in this subchapter;

(11) “Repetitive” means filed within six (6) months of an application under § 5-2-316 that has been previously denied and that fails to demonstrate a material change in circumstances;

(12)(A) “Restraint” means any manual method, physical or mechanical device, material, or equipment that immobilizes a person or reduces the ability of a person to move his or her arms, legs, body, or head freely.

(B) “Restraint” does not include devices such as orthopedically prescribed devices, surgical dressings or bandages, protective helmets, or other methods that involve the physical holding of a person for the purpose of protecting the person from falling or to permit the person to participate in activities without the risk of physical harm to himself or herself; and

(13) “State mental health system” means the Arkansas State Hospital and any other facility or program certified by the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services.

History. Acts 1975, No. 280, § 616; A.S.A. 1947, § 41-616; Acts 1995, No. 767, § 1; 1997, No. 922, § 1; 2001, No. 1554, § 1; 2007, No. 636, § 1; 2013, No. 981, §§ 1, 2; 2017, No. 472, §§ 1-3; 2017, No. 913, §§ 11, 12.

Amendments. The 2017 amendment by No. 472 deleted the definition for “Capacity of the defendant to have the culpable mental state”; added the definitions

for “Expert” and “Lack of criminal responsibility”; and added “or resulting from a progressively deteriorating neurological condition” in (7)(A)(iii).

The 2017 amendment by No. 913 substituted “Division of Aging, Adult, and Behavioral Health Services” for “Division of Behavioral Health Services” in (3) and (13).

CASE NOTES

Capacity to Form Specific Intent.

Where defendant was found guilty of first-degree murder and attempted first-degree murder, the trial court did not abuse its discretion in excluding certain expert testimony regarding defendant’s capacity to form intent. The expert’s report did not state that defendant lacked the capacity to form intent, only that it was impacted or impaired, and the expert

also opined that defendant’s psychotic disorder did not render him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Furthermore, there was ample evidence of purposeful conduct where defendant left a bar and returned with a shotgun that he used against the victims. *Edwards v. State*, 2015 Ark. 377, 472 S.W.3d 479 (2015).

5-2-302. Lack of fitness to proceed generally.

RESEARCH REFERENCES

ALR. Amnesia as Affecting Defendant’s Competency to Stand Trial. 100 A.L.R.6th 535 (2014).

Posttraumatic Stress Disorder (PTSD) as Defense to Murder, Assault, or other Violent Crime. 4 A.L.R.7th Art. 5 (2015).

CASE NOTES

ANALYSIS

Competency.
Jurisdiction.
Review.

Competency.

Trial court erred under subsection (a) of this section in denying defendant’s petition for writ of error coram nobis because the record overwhelmingly illustrated that his cognitive deficits and mental illnesses interfered with his ability to effectively and rationally assist counsel during his murder trial. *Newman v. State*, 2014 Ark. 7 (2014), appeal dismissed, 2017 Ark. 257, 525 S.W.3d 457 (2017).

There was no evidence to suggest incompetency other than the fact that defendant rambled, had an unusual speech pattern, and testified to irrelevant matters, which was insufficient to require the trial court to sua sponte halt the proceedings and order a competency evaluation. Thus, defendant could not avail himself of the exception to the rule that a court would not address arguments raised for the first time on appeal, and as he failed to raise the issue below, and the trial court was not obligated to raise it sua sponte, the revocation of probation was affirmed. *Lewis v. State*, 2016 Ark. App. 503, 505 S.W.3d 725 (2016).

There was no abuse of discretion in the

trial court's denial of defendant's request for a second mental evaluation; in the first evaluation conducted by a doctor at the state hospital, defendant was found to be competent to stand trial, and the doctor testified at trial that after talking with defendant that day his opinion had not changed. *Hamilton v. State*, 2017 Ark. App. 447, 526 S.W.3d 859 (2017) (decision under prior law).

Jurisdiction.

Circuit court did not have jurisdiction to reconsider its decision dismissing the charges against defendant and to set the case for a status hearing on defendant's fitness for trial where the State filed neither a motion nor an appeal within 30 days of entry of the order of dismissal. *Rosales-Almenar v. State*, 2017 Ark. App. 678 (2017).

Review.

Trial court did not err by failing to sua sponte order a competency hearing because both the State's expert and defendant's expert agreed prior to trial that

defendant had no mental defect and was fit to stand trial, the defense never requested that defendant be reevaluated, the trial court was not unreasonable in believing that defendant had the capacity to understand the nature and object of the proceedings despite exhibiting some bizarre behavior, and there was not evidence that defendant was unable to consult with counsel. *Britton v. State*, 2014 Ark. 192, 433 S.W.3d 856 (2014).

Circuit court order denying appellant's motion for mental evaluation was reversed where the original record contained only the circuit court's orders that did not include any findings, the recollections of what had taken place were not definitive, and a filed, written order was not provided; thus, there was nothing in the record or supplemented record to determine on what basis the circuit court had made its decision to deny the mental evaluation and find appellant competent to proceed. *Watson v. State*, 2018 Ark. App. 169, 547 S.W.3d 89 (2018).

5-2-303. Admissibility of evidence to show mental state.

CASE NOTES

ANALYSIS

Purposely.
Relevancy.

Purposely.

Where defendant was found guilty of first-degree murder and attempted first-degree murder, the trial court did not abuse its discretion in excluding certain expert testimony regarding defendant's capacity to form intent. The expert's report did not state that defendant lacked the capacity to form intent, only that it was impacted or impaired, and the expert also opined that defendant's psychotic disorder did not render him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements

of the law. Furthermore, there was ample evidence of purposeful conduct where defendant left a bar and returned with a shotgun that he used against the victims. *Edwards v. State*, 2015 Ark. 377, 472 S.W.3d 479 (2015).

Relevancy.

Trial court abused its discretion in excluding the proffered testimony of defendant, defendant's mother, and his friend about his mental disease, because it was directly relevant to the requirement that the State prove, beyond a reasonable doubt, that defendant purposely kidnapped and battered his victims, and thus admissible under this section. *Brown v. State*, 2016 Ark. App. 616, 509 S.W.3d 671 (2016).

5-2-304. Notice requirement.

(a) When a defendant intends to raise lack of criminal responsibility as a defense in a prosecution or put in issue his or her fitness to proceed, the defendant shall notify the prosecutor and the court at the earliest practicable time.

(b)(1) Failure to notify the prosecutor within a reasonable time before the trial date entitles the prosecutor to a continuance that for limitation purposes is deemed an excluded period granted on application of the defendant.

(2) Alternatively, in lieu of suspending any further proceedings under § 5-2-328, the court may order the immediate examination of the defendant at a designated receiving facility or program by an expert.

History. Acts 1975, No. 280, § 604; 1977, No. 360, § 1; A.S.A. 1947, § 41-604; Acts 1995, No. 767, § 2; 2017, No. 472, § 4.

Amendments. The 2017 amendment substituted “lack of criminal responsibil-

ity” for “mental disease or defect” in (a); and, in (b)(2), substituted “§ 5-2-328” for “§ 5-2-305” and “an expert” for “a qualified psychiatrist or a qualified psychologist”.

CASE NOTES

Notice.

Circuit court acted without jurisdiction in ordering defendant to submit to a criminal responsibility examination because defendant had not filed a notice of intent

to raise the defense of not guilty for reason of mental disease or defect. *Friar v. Erwin*, 2014 Ark. 487, 450 S.W.3d 666 (2014).

Cited: *King v. State*, 2014 Ark. App. 81, 432 S.W.3d 127 (2014).

5-2-305. [Repealed.]

A.C.R.C. Notes. This section was amended by Acts 2017, No. 913, §§ 13 and 14 to change the name of the Division of Behavioral Health Services to the Division of Aging, Adult, and Behavioral Health Services in subdivisions (a)(3)(B), (b)(1)(C), (b)(2), and (b)(3). However, this section was specifically repealed by Acts 2017, No. 472, § 5.

Publisher's Notes. This section, concerning mental health examination of de-

fendant, was repealed by Acts 2017, No. 472, § 5. The section was derived from Acts 1975, No. 280, § 605; 1977, No. 360, § 2; 1979, No. 886, § 1; 1983, No. 191, § 3; A.S.A. 1947, § 41-605; Acts 1989, No. 645, §§ 5, 6; 1989, No. 898, § 1; 1989, No. 911, §§ 5, 6; 1995, No. 767, § 3; 2001, No. 1554, § 3; 2011, No. 991, §§ 1-3; 2013, No. 506, § 1; 2015, No. 1155, §§ 1, 2. For current law, see §§ 5-2-327 — 5-2-530.

RESEARCH REFERENCES

ALR. Adequacy, Under Strickland Standard, of Defense Counsel's Representation of Client in Sentencing Phase of State Court Death Penalty Case — Coun-

sel's Purported Complete Failure to Investigate Client's Mental Illness or Dysfunction. 6 A.L.R.7th Art. 3 (2015).

5-2-307. Admissibility of statements made during examination or treatment.

A statement made by a person during an examination or treatment is admissible as evidence only:

- (1) To the extent permitted by the Arkansas Rules of Evidence; and
- (2) If the statement is constitutionally admissible.

History. Acts 1975, No. 280, § 615; 1977, No. 360, § 3; A.S.A. 1947, § 41-615; Acts 2017, No. 472, § 6.

Amendments. The 2017 amendment

substituted “A” for “Any” in the introductory language; and substituted “Arkansas Rules of Evidence” for “Uniform Rules of Evidence, § 16-41-101 [repealed]” in (1).

5-2-308. Expert witnesses — Mental health examiner.

(a)(1) At a hearing concerning a defendant’s lack of criminal responsibility or fitness to proceed, or upon trial, an examiner who conducted an examination under § 5-2-327 or § 5-2-328 may be called as a witness by the prosecution, the defendant, or the court.

(2) If the examiner is called by the court, he or she is subject to cross-examination by the prosecution and by the defendant.

(b) Both the prosecution and the defendant may summon any other qualified physician or other expert to testify.

History. Acts 1975, No. 280, § 611; A.S.A. 1947, § 41-611; Acts 2017, No. 472, § 7.

Amendments. The 2017 amendment added “Mental health examiner” in the section heading; redesignated former (a) as (a)(1); in (a)(1), inserted “lack of criminal” and substituted “conducted an exami-

nation under § 5-2-327 or § 5-2-328” for “reported pursuant to § 5-2-305”; redesignated former (b) as (a)(2); in (a)(2), substituted “If the examiner is called” for “If called” and “he or she” for “the examiner called as a witness”; redesignated former (c) as present (b); and made a stylistic change.

5-2-309. Determination of fitness to proceed.

(a) If the defendant’s fitness to proceed becomes an issue at any stage of the case, the issue of the defendant’s fitness to proceed shall be determined by the court.

(b) If neither party contests the finding of the report filed pursuant to § 5-2-327, the court may make the determination under subsection (a) of this section on the basis of the report.

(c) If the finding of the report is contested, the court shall hold a hearing on the issue of the defendant’s fitness to proceed.

History. Acts 1975, No. 280, § 606; A.S.A. 1947, § 41-606; Acts 2017, No. 472, § 8.

Amendments. The 2017 amendment

inserted “at any stage of the case” in (a); and substituted “§ 5-2-327” for “§ 5-2-305” in (b).

RESEARCH REFERENCES

ALR. Amnesia as Affecting Defendant’s Competency to Stand Trial. 100 A.L.R.6th 535 (2014).

CASE NOTES

Hearing.

In a probation revocation case, a trial court did not err by failing to hold a hearing on defendant’s competency or suspend the proceedings and order a mental

evaluation because a doctor’s findings were not challenged. Even if counsel’s statements to the trial court were viewed as a motion for a second evaluation, there was no ruling from the trial court on this

issue, which precluded appellate review. *Singleton v. State*, 2014 Ark. App. 165 (2014).

Trial court erred in denying defendant's request for a competency hearing because a hearing was mandatory where defen-

dant plainly took issue with a psychologist's finding that he was competent and requested a hearing. *Simpson v. State*, 2015 Ark. App. 103, 455 S.W.3d 856 (2015).

5-2-310. Lack of fitness to proceed — Procedures subsequent to finding.

(a)(1)(A) If the court determines that a defendant lacks fitness to proceed, the proceeding against him or her shall be suspended and the court may commit the defendant to the custody of the Department of Human Services for detention, care, and treatment until restoration of fitness to proceed.

(B) However, if the court is satisfied that the defendant may be released without danger to himself or herself or to the person or property of another, the court may order the defendant's release and the release shall continue at the discretion of the court on conditions the court determines necessary.

(2) A copy of the report filed under § 5-2-327 shall be attached to the order of commitment or order of conditional release.

(b)(1) Within a reasonable period of time, but in any case within ten (10) months of a commitment pursuant to subsection (a) of this section, the department shall file with the committing court a written report indicating whether the defendant is fit to proceed, or if not, whether:

(A) The defendant's mental disease or defect is of a nature precluding restoration of fitness to proceed; and

(B) The defendant presents a danger to himself or herself or to the person or property of another.

(2)(A) The court shall make a determination within one (1) year of a commitment pursuant to subsection (a) of this section.

(B) Pursuant to the report of the department or as a result of a hearing on the report, if the court determines that the defendant is fit to proceed, prosecution in ordinary course may commence.

(C) If the defendant lacks fitness to proceed but does not present a danger to himself or herself or to the person or property of another, the court may release the defendant on conditions the court determines to be proper.

(D) If the defendant lacks fitness to proceed and presents a danger to himself or herself or the person or property of another, the court shall order the department to petition for an involuntary admission.

(E) Upon filing of an order finding that the defendant lacks fitness to proceed issued under subdivision (b)(2)(A) of this section with a circuit clerk or a probate clerk, the circuit clerk or the probate clerk shall submit a copy of the order to the Arkansas Crime Information Center.

(c)(1) On the court's own motion or upon application of the department, the prosecuting attorney, or the defendant, and after a hearing if

a hearing is requested, if the court determines that the defendant has regained fitness to proceed, the criminal proceeding shall be resumed.

(2) However, if the court is of the view that so much time has elapsed since the alleged commission of the offense in question that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

History. Acts 1975, No. 280, § 607; A.S.A. 1947, § 41-607; Acts 1989, No. 645, § 1; 1989, No. 911, § 1; 2007, No. 463, § 1; 2007, No. 568, § 1; 2017, No. 472, § 9.

Amendments. The 2017 amendment substituted “under § 5-2-327” for “pursuant to § 5-2-305” in (a)(2).

CASE NOTES

ANALYSIS

Dismissal of Charges.
Speedy Trial.

Dismissal of Charges.

Circuit court does not have the authority under this section to dismiss charges against an unfit defendant; the plain language of this section involves only the situation in which a criminal defendant has regained his or her fitness to stand trial. Therefore, the dismissal of second-degree battery and second-degree assault charges was improper since there was no evidence that defendant had become competent to stand trial. *State v. Thomas*, 2014 Ark. 362, 439 S.W.3d 690 (2014).

Parties agreed that the circuit court’s dismissal of the case under this section was error but the circuit court did not have jurisdiction to reconsider its dismissal, reinstate the case, and set a status hearing as the State did not file an appeal, a motion for a new trial, or any other

written motion to reconsider within 30 days of entry of the order. *Schepp v. State*, 2017 Ark. App. 677, 536 S.W.3d 663 (2017).

Circuit court did not have jurisdiction to reconsider its decision dismissing the charges against defendant and to set the case for a status hearing on defendant’s fitness for trial where the State filed neither a motion nor an appeal within 30 days of entry of the order of dismissal. *Rosales-Almenar v. State*, 2017 Ark. App. 678 (2017).

Speedy Trial.

Exclusion from the 12-month speedy-trial period of the time period between when defendant was committed for restoration until he was determined to be competent was appropriate; the circuit court was unable to determine that defendant was fit to proceed during that time primarily because defendant refused to submit to an evaluation. *Newman v. Cottrell*, 2016 Ark. 413, 503 S.W.3d 74 (2016).

5-2-312. Lack of criminal responsibility — Affirmative defense.

(a)(1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged he or she lacked criminal responsibility.

(2) When the affirmative defense of lack of criminal responsibility is presented to a jury, prior to deliberations the jury shall be instructed regarding the disposition of a defendant acquitted due to the defendant’s lack of criminal responsibility as described under § 5-2-314.

(b) When a defendant is acquitted on a ground of lack of criminal responsibility, the verdict and judgment shall state that the defendant was acquitted on a ground of lack of criminal responsibility.

History. Acts 1975, No. 280, § 601; A.S.A. 1947, § 41-601; Acts 2001, No. 248, § 1; 2017, No. 472, § 10.

Amendments. The 2017 amendment substituted “criminal responsibility” for “capacity” in the section heading; substituted “criminal responsibility” for “capacity as a result of mental disease or defect to” in (a)(1); deleted (a)(1)(A) and (a)(1)(B); in (a)(2), substituted “lack of criminal re-

sponsibility” for “mental disease or defect” and substituted “due to the defendant’s lack of criminal responsibility as described under” for “on a ground of mental disease or defect pursuant to”; deleted former (b); redesignated former (c) as present (b); and twice substituted “lack of criminal responsibility” for “mental disease or defect” in (b).

RESEARCH REFERENCES

ALR. Posttraumatic Stress Disorder (PTSD) as Defense to Murder, Assault, or

other Violent Crime. 4 A.L.R.7th Art. 5 (2015).

CASE NOTES

ANALYSIS

Evidence.

Expert Testimony.

Ineffective Assistance of Counsel.

Instructions.

Judicial Review.

Mental Disease or Defect.

Evidence.

Defendant was properly found guilty of first-degree murder because she purposely caused the 80-year-old victim’s death by stabbing him approximately 36 times, deliberately sought to conceal evidence, and the jury was entitled to believe the testimony of one expert over the other and to find that defendant had not proved the defense of mental disease or defect by a preponderance of the evidence. *Fink v. State*, 2015 Ark. 331, 469 S.W.3d 785 (2015).

Expert Testimony.

Where defendant was found guilty of first-degree murder and attempted first-degree murder, the trial court did not abuse its discretion in excluding certain expert testimony regarding defendant’s capacity to form intent. The expert’s report did not state that defendant lacked the capacity to form intent, only that it was impacted or impaired, and the expert also opined that defendant’s psychotic disorder did not render him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Furthermore, there was ample evidence of purposeful conduct where defendant left a bar and returned with a

shotgun that he used against the victims. *Edwards v. State*, 2015 Ark. 377, 472 S.W.3d 479 (2015).

Where the trial court excluded expert testimony in a first-degree murder trial regarding defendant’s capacity to form intent, defendant’s assertion that he was denied due process by the deprivation of his only defense was not preserved for appellate review because defendant did not raise the argument to the circuit court. *Edwards v. State*, 2015 Ark. 377, 472 S.W.3d 479 (2015).

Ineffective Assistance of Counsel.

Trial court did not clearly err when it found that trial counsel was not ineffective for failing to request a mental evaluation before advising appellant to plead guilty; the conclusions presented in the postconviction mental evaluation established that it was unlikely that a more thorough investigation of appellant’s mental-health history would have produced sufficient evidence supporting an affirmative defense or would have eliminated appellant’s exposure to a possible death sentence. *True v. State*, 2017 Ark. 323, 532 S.W.3d 70 (2017).

Instructions.

Circuit court did not abuse its discretion in refusing to instruct the jury on defendant’s mental state at the time of the offense because defendant presented no supporting evidence for the instructions; the defense’s own witness opined that at the time of the crime defendant did not have a severe mental disease or defect. *Cage v. State*, 2017 Ark. 277, 528 S.W.3d 825 (2017).

Judicial Review.

Circuit court did not abuse its discretion in denying defendant's motion for acquittal based on lack of capacity because the circuit court was confronted with conflicting forensic evaluations, and the existence of conflicting proof and the consequent questions of fact that arose from the conflicts supported the circuit court's discretionary decision to deny defendant's motion for acquittal. *Russell v. State*, 2013 Ark. 369 (2013).

Mental Disease or Defect.

In a second-degree murder case, a trial court did not abuse its discretion by allowing testimony from a second doctor that personality disorders were not mental dis-

eases in the context of this statute because testimony about what constituted a mental disease had previously been accepted; the challenged testimony simply embraced the issue of mental disease from a medical point of view, and it did not mandate a legal conclusion. Moreover, because a first doctor opined that a personality disorder was a mental disease in her report, and the report was entered into evidence, her opinion, despite being written and not oral, was evidence properly subject to rebuttal. *Hajek-McClure v. State*, 2014 Ark. App. 690, 450 S.W.3d 259 (2014).

Cited: *Edwards v. State*, 2017 Ark. 207 (2017).

5-2-313. Acquittal based on lack of criminal responsibility report.

(a) On the basis of the report filed under § 5-2-328 and after a hearing, if a hearing is requested, the court may enter judgment of acquittal on the ground of lack of criminal responsibility if the court is satisfied that the following criteria are met:

(1) The defendant currently has the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense; and

(2) At the time of the conduct charged, the defendant lacked criminal responsibility.

(b) If the defendant did not raise the issue of lack of criminal responsibility as an affirmative defense under § 5-2-328, then the court is required to make a factual determination that the defendant committed the offense and that he or she lacked criminal responsibility at the time of the commission of the offense.

History. Acts 1975, No. 280, § 609; A.S.A. 1947, § 41-609; Acts 1989, No. 645, § 2; 1989, No. 911, § 2; 2001, No. 1554, § 4; 2017, No. 472, § 11.

Amendments. The 2017 amendment substituted "lack of criminal responsibility" for "mental health" in the section

heading; substituted "lack of criminal responsibility" for "mental disease or defect" and similar language throughout the section; substituted "§ 5-2-328" for "5-2-305" in (a) and (b); rewrote (a)(2); and made stylistic changes.

CASE NOTES**Acquittal Denied.**

Circuit court did not abuse its discretion in denying defendant's motion for acquittal based on lack of capacity because the circuit court was confronted with conflicting forensic evaluations, and the existence

of conflicting proof and the consequent questions of fact that arose from the conflicts supported the circuit court's discretionary decision to deny defendant's motion for acquittal. *Russell v. State*, 2013 Ark. 369 (2013).

5-2-314. Acquittal — Examination of defendant — Hearing.

(a) When a defendant is acquitted due to the defendant's lack of criminal responsibility, a circuit court is required to determine, and to include the determination in the order of acquittal, one (1) of the following:

(1) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect;

(2) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect;

(3) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect; or

(4) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect.

(b)(1) If the circuit court enters a determination based on subdivision (a)(1) or subdivision (a)(3) of this section, the circuit court shall order the defendant committed to the custody of the Department of Human Services for an examination by a psychiatrist or a licensed psychologist.

(2) Upon filing of an order of commitment under subdivision (b)(1) of this section with a circuit clerk, the circuit clerk shall submit a copy of the order to the Arkansas Crime Information Center.

(c) If the circuit court enters a determination based on subdivision (a)(2) or subdivision (a)(4) of this section, the circuit court shall immediately discharge the defendant.

(d)(1)(A) The department shall file the psychiatric or psychological report with the probate clerk of the circuit court having venue within thirty (30) days following receipt of an order of acquittal.

(B) If before thirty (30) days the department makes application to the circuit court for an extension of time to file the psychiatric or psychological report and the circuit court finds there is good cause for the delay, the circuit court may order that additional time be allowed for the department to file the psychiatric or psychological report.

(C) A hearing shall be conducted by the circuit court and shall take place not later than ten (10) days following the filing of the psychiatric or psychological report with the circuit court.

(2) If the psychiatric or psychological report is not filed within thirty (30) days following the department's receipt of an order of acquittal or

within such additional time as authorized by the circuit court, the circuit court may grant a petition for a writ of habeas corpus ordering the release of the defendant under terms and conditions that are reasonable and just for the defendant and societal concerns about the safety of persons and property of others.

(e)(1) A person found not guilty of an offense involving bodily injury to another person or serious damage to the property of another person or involving a substantial risk of bodily injury to another person or serious damage to the property of another person due to the person's lack of criminal responsibility has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another person due to a present mental disease or defect.

(2) With respect to any other offense, the person has the burden of proof by a preponderance of the evidence.

(f)(1) A person acquitted whose mental condition is the subject of a hearing has a right to counsel.

(2)(A) If it appears to the circuit court that the person acquitted is in need of counsel, an attorney shall be appointed immediately upon filing of the original petition.

(B)(i) When an attorney is appointed by the circuit court, the circuit court shall determine the amount of the fee to be paid the attorney appointed by the circuit court and issue an order of payment.

(ii) The amount of the fee allowed shall be based upon the time and effort of the attorney in the investigation, preparation, and representation of the client at the court hearings.

(g)(1) The quorum court of each county shall appropriate funds for the purpose of payment of the attorney's fees provided for by subsection (f) of this section.

(2) Upon presentment of a claim accompanied by an order of the circuit court fixing the fee, the claim shall be approved by the county court and paid in the same manner as other claims against the county are paid.

(h) A hearing conducted pursuant to subsection (d) of this section may be held at the Arkansas State Hospital or a designated receiving facility or program where the person acquitted is detained.

(i) When conducting any hearing set out in this section, the circuit judge may conduct the hearing within any county of his or her judicial district.

(j)(1)(A) It is the duty of the prosecuting attorney's office in the county where the petition is filed to represent the State of Arkansas at any hearing held pursuant to this section except a hearing pending at the Arkansas State Hospital in Pulaski County.

(B) A prosecuting attorney may contract with another attorney to provide services under subdivision (j)(1)(A) of this section.

(2) The office of the Prosecutor Coordinator shall appear for and on behalf of the State of Arkansas at the Arkansas State Hospital in Little Rock.

(3) Representation under this subsection is a part of the official duties of a prosecuting attorney or the office of the Prosecutor Coordinator and the prosecuting attorney or the office of the Prosecutor Coordinator is immune from civil liability in the performance of this official duty.

History. Acts 1989, No. 645, § 3; 1989, No. 821, § 1; 1989, No. 911, § 3; 1995, No. 609, § 1; 2003, No. 1185, § 3; 2005, No. 1446, § 1; 2007, No. 463, § 2; 2007, No. 568, § 3; 2017, No. 472, §§ 12, 13.

Amendments. The 2017 amendment substituted “due to the defendant’s lack of criminal responsibility” for “on the ground

of mental disease or defect” in the introductory language of (a); and, in (e)(1), substituted “A person found not guilty” for “A person found not guilty on the ground of mental disease or defect” and inserted “due to the person’s lack of criminal responsibility”.

CASE NOTES

Denial of Release.

Appellant did not meet his burden under subdivision (e)(1) of this section. Although appellant had not been physically aggressive while at the hospital, he had verbally threatened others and the doctor opined that appellant continued to be a

high risk of danger to himself and others; thus, the circuit court did not clearly err by refusing to release appellant from the custody of the Department of Human Services. *Beare v. Ark. Dep’t of Human Servs.* (In re Beare), 2018 Ark. App. 598 (2018).

5-2-315. Discharge or conditional release.

(a)(1)(A) When the Secretary of the Department of Human Services or his or her designee determines that a person acquitted has recovered from his or her mental disease or defect to such an extent that his or her release or his or her conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another person, the secretary shall promptly file an application for discharge or conditional release of the person acquitted with the circuit court that ordered the commitment.

(B) In addition, if the person acquitted has an impairment due to alcohol or substance abuse, the secretary may petition the circuit court for involuntary commitment under § 20-64-815.

(2) The secretary shall send a copy of the application to the counsel for the person acquitted and to the attorney for the state.

(b)(1) Within twenty (20) days after receiving the application for discharge or conditional release of the person acquitted, the attorney for the state may petition the circuit court for a hearing to determine whether the person acquitted should be released.

(2) If the attorney for the state does not request a hearing, the circuit court may conduct a hearing on its own motion or discharge the person acquitted.

(c) If the circuit court finds after a hearing under subsection (b) of this section by the standard specified in § 5-2-314(e) that the person

acquitted has recovered from his or her mental disease or defect to such an extent that:

(1) The discharge of the person acquitted would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person, then the circuit court shall order that the person acquitted be immediately discharged; or

(2) The conditional release of the person acquitted under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person, then the circuit court shall order:

(A) That the person acquitted be conditionally released under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been:

(i) Prepared for the person acquitted;

(ii) Certified to the circuit court as appropriate by the director of the facility in which the person acquitted is committed; and

(iii) Found by the circuit court to be appropriate; and

(B) Explicit conditions of release, including without limitation requirements that:

(i) The person acquitted comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment;

(ii) The person acquitted be subject to regularly scheduled personal contact with a compliance monitor for the purpose of verifying compliance with the conditions of release;

(iii) Compliance with the conditions of release be documented with the circuit court by the compliance monitor at ninety-day intervals or at such intervals as the circuit court may order; and

(iv) Impose the conditions of release for a period of up to five (5) years.

(d) If the circuit court determines that the person acquitted has not met his or her burden of proof under subsection (c) of this section, the person acquitted shall continue to be committed to the custody of the Department of Human Services.

(e) A person ordered to be in charge of a prescribed regimen of medical, psychiatric, or psychological care or treatment of a person acquitted shall provide:

(1) The prescribed regimen of medical, psychiatric, or psychological care or treatment;

(2) Periodic written documentation to a compliance monitor of compliance with the conditions of release, including, but not limited to, documentation of compliance with the prescribed:

(A) Medication;

(B) Treatment and therapy;

(C) Substance abuse treatment; and

(D) Drug testing; and

(3)(A) Written notice of any failure of the person acquitted to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment to the:

- (i) Compliance monitor;
- (ii) Attorney for the person acquitted;
- (iii) Attorney for the state; and
- (iv) Circuit court having jurisdiction.

(B) The written notice under subdivision (e)(3)(A) of this section shall be provided immediately upon the failure of the person acquitted to comply with a condition of release.

(C)(i) Upon the written notice under subdivision (e)(3)(A) of this section or upon other probable cause to believe that the person acquitted has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person acquitted may be detained and shall be taken without unnecessary delay before the circuit court having jurisdiction over him or her.

(ii) After a hearing, the circuit court shall determine whether the person acquitted should be remanded to an appropriate facility on the ground that, in light of his or her failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his or her continued release would create a substantial risk of bodily injury to another person or serious damage to property of another person.

(D) At any time after a hearing employing the same criteria, the circuit court may modify or eliminate the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(f)(1) Regardless of whether the secretary or his or her designee has filed an application pursuant to a provision of subsection (a) of this section, and at any time during the commitment of the person acquitted, a person acquitted, his or her counsel, or his or her legal guardian may file with the circuit court that ordered the commitment a motion for a hearing to determine whether the person acquitted should be discharged from the facility in which the person acquitted is committed.

(2) However, no motion under subdivision (f)(1) of this section may be filed more than one (1) time every one hundred eighty (180) days.

(3) A copy of the motion under subdivision (f)(1) of this section shall be sent to the:

(A) Director of the facility in which the person acquitted is committed; and

(B) Attorney for the state.

History. Acts 1989, No. 645, § 4; 1989, No. 911, § 4; 1995, No. 609, § 2; 1995, No. 767, § 4; 1997, No. 922, § 2; 2011, No. 990, § 1; 2019, No. 910, §§ 5122, 5123.

Amendments. The 2019 amendment

substituted “Secretary of the Department of Human Services” for “Director of the Department of Human Services” in (a)(1)(A); and substituted “secretary” for “director” throughout (a) and in (f)(1).

CASE NOTES

Quasi-Judicial Immunity.

Because a lawsuit sought to hold a psychiatrist liable for the psychiatrist’s performance of functions integral to the judi-

cial process in providing psychiatric treatment to a conditional releasee as mandated by the conditional release order, the psychiatrist was entitled to quasi-

judicial immunity when the releasee murdered the decedent; although the psychiatrist was not specifically identified in the conditional release order, the psychiatrist's treatment of the releasee ex-

pressly arose from the conditional release order and was within the scope of that order. *Martin v. Smith*, 2019 Ark. 232, 576 S.W.3d 32 (2019).

5-2-316. Conditional release — Subsequent discharge, modification, or revocation.

(a)(1) The Secretary of the Department of Human Services or his or her designee or a person conditionally released under § 5-2-315, or both, may apply to the court ordering the conditional release for discharge from or modification of the order granting conditional release on the ground that the person conditionally released under § 5-2-315 may be discharged or the order modified without danger to the person conditionally released under § 5-2-315 or to the person or property of another person.

(2) The application shall be accompanied by a supporting affidavit of a qualified physician.

(3) A copy of the application and affidavit shall be transmitted to the prosecuting attorney of the judicial circuit from which the person was conditionally released and to any person supervising his or her release, and the hearing on the application shall be held following notice to the prosecuting attorney and the person supervising his or her release.

(4) On its own motion or on the motion of a party, a court shall dismiss an application made under this section if the court determines that the application is frivolous or repetitive.

(b)(1) After notice to the conditionally released person and a hearing, the court may determine that the conditionally released person has violated a condition of release or that for the safety of the conditionally released person or for the safety of the person or property of another person the conditional release should be modified, extended for a period specified by the court not to exceed five (5) years, or revoked.

(2)(A) If an order is entered revoking the most recent order of conditional release under subdivision (b)(1) of this section, all conditions of the release shall be abated, and the person shall be ordered to be committed to the custody of the secretary or the secretary's designee.

(B) After the revocation described in subdivision (b)(2)(A) of this section, the person is subject to future discharge or conditional release only under the procedure prescribed in § 5-2-315.

History. Acts 1975, No. 280, § 614; A.S.A. 1947, § 41-614; Acts 1997, No. 922, § 3; 2007, No. 623, § 1; 2011, No. 990, § 2; 2013, No. 981, § 3; 2013, No. 1125, § 1; 2019, No. 910, §§ 5124, 5125.

Amendments. The 2019 amendment

substituted "Secretary of the Department of Human Services" for "Director of the Department of Human Services" in (a)(1); and substituted "secretary" for "director" and "secretary's" for "director's" in (b)(2)(A).

CASE NOTES

Revocation Upheld.

Circuit court did not err in revoking appellant's order of conditional release from the state mental hospital where her release was conditioned on treating her one-on-one nurse with dignity and respect and taking her medication, and the evi-

dence showed that she was noncompliant with taking her medication, she was verbally hostile to multiple individuals assisting with her treatment, and she threatened to beat and kill her nurse. *Allmon-Lipscomb v. Arkansas*, 2017 Ark. App. 301 (2017).

5-2-317. Jurisdiction and venue.

(a) A circuit court has exclusive jurisdiction over a person acquitted by reason of mental disease or defect and committed to the custody of the Secretary of the Department of Human Services pursuant to § 5-2-314(b).

(b) Venue is determined as follows:

(1) For a person committed to the custody of the Department of Human Services pursuant to § 5-2-314(b) and who has been committed to the Arkansas State Hospital for examination, then venue may be in Pulaski County for the initial hearing pursuant to § 5-2-314 and for a conditional release hearing pursuant to § 5-2-315; and

(2) For a person who has been conditionally released pursuant to § 5-2-315, then venue for any hearing seeking the modification, revocation, or dismissal of a conditional release order is in the county where the person currently resides.

History. Acts 1995, No. 609, § 3; 2003, No. 1185, § 4; 2005, No. 1845, § 1; 2019, No. 910, § 5126.

substituted "Secretary of the Department of Human Services" for "Director of the Department of Human Services" in (a).

Amendments. The 2019 amendment

5-2-327. Examination of defendant — Fitness to proceed.

(a)(1) Any party or the court may raise the issue of the defendant's fitness to proceed.

(2) The court shall order an examination under this section if it finds there is a reasonable suspicion that a defendant is not fit to proceed.

(3)(A) Subject to §§ 5-2-304 and 5-2-311, the court shall immediately suspend further proceedings in a prosecution if it has ordered an examination under this section.

(B)(i) If a jury has been impaneled and the court suspends proceedings under subdivision (a)(3)(A) of this section, the court may retain the jury or declare a mistrial and discharge the jury.

(ii) A discharge of the jury is not a bar to further prosecution.

(4) If a court suspends further proceedings in the prosecution under subdivision (a)(3)(A) of this section, the court shall enter an order:

(A) Appointing one (1) or more experts who do not practice in the Arkansas State Hospital to examine the defendant and report on the defendant's mental condition; or

(B)(i) Directing the Director of the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services to

provide an expert who will examine and report upon the defendant's mental condition.

(ii) The director or his or her designee shall determine the location of the examination required under subdivision (a)(4)(B)(i) of this section.

(b) An examination ordered under this section shall be for a period not exceeding sixty (60) days unless the director or his or her designee determines a longer period of examination is necessary for the purpose of the examination.

(c)(1) A uniform order to be used by a court ordering an examination of a defendant's fitness to proceed under this section shall be developed by the Administrative Office of the Courts in conjunction with the following organizations:

- (A) The Arkansas Prosecuting Attorneys Association;
- (B) The Department of Human Services; and
- (C) The Arkansas Public Defender Commission.

(2) The uniform order developed under this subsection shall contain the following information:

- (A) The defendant's name, age, gender, and race;
- (B) The criminal charges pending against the defendant;
- (C) The defendant's attorney's name and address;
- (D) The defendant's custody status;
- (E) The case number for which the examination was ordered;
- (F) A unique identifying number on the incident reporting form as required by the Arkansas Crime Information Center; and
- (G) The name of the requesting attorney, if applicable.

(3) An examination under this section shall not be conducted without using the uniform order required under this subsection.

(4) The uniform order shall require the prosecuting attorney to provide to the examiner any information relevant to the examination, including without limitation:

- (A) The name and address of any attorney involved in the matter; and
- (B) Information about the alleged offense.

(5) The court may require the attorney for the defendant to provide any available information relevant to the examination, including without limitation:

- (A) Psychiatric records;
- (B) Medical records; or
- (C) Records pertaining to treatment of the defendant for substance or alcohol abuse.

(d)(1) An examination report ordered under this section shall be filed with the clerk of the court ordering the examination and is a public record.

(2) The court clerk shall provide copies of the examination report to the defendant's attorney and the prosecuting attorney.

(e)(1) An examination report prepared by an examiner ordered under this section shall:

(A) Contain an opinion as to whether or not the defendant is fit to proceed and the basis for the opinion;

(B) Contain an opinion as to whether the defendant has a mental disease or defect;

(C) Contain a substantiated diagnosis in the terminology of the American Psychiatric Association's most current edition of the Diagnostic and Statistical Manual of Mental Disorders;

(D) Document that the examiner explained to the defendant:

(i) The purpose of the examination;

(ii) The persons to whom the examination report is provided; and

(iii) The limits on rules of confidentiality applying to the relationship between the examiner and the defendant; and

(E) Describe, in specific terms:

(i) The procedures, techniques, and tests used in the examination;

(ii) The purpose of each procedure, technique, or test; and

(iii) The conclusions reached.

(2) An examiner's opinion on the defendant's fitness to proceed or lack of fitness to proceed may not be based solely on the defendant's refusal to communicate during the examination.

(3)(A) During an examination to determine a defendant's fitness to proceed and in any examination report based on that examination, an examiner shall consider:

(i) The capacity of the defendant during criminal proceedings to:

(a) Rationally understand the charges against him or her and the potential consequences of the pending criminal proceedings;

(b) Disclose to the defendant's attorney pertinent facts, events, and states of mind;

(c) Engage in a reasoned choice of legal strategies and options;

(d) Understand the adversarial nature of criminal proceedings;

(e) Exhibit appropriate courtroom behavior; and

(f) Testify;

(ii) As supported by current indications and the defendant's personal history, whether the defendant is a person with:

(a) A mental disease or defect; or

(b) An intellectual disability; and

(iii) The degree of impairment resulting from the mental disease or defect or intellectual disability, if existent, and the specific impact on the defendant's capacity to engage with the defendant's attorney in an effective manner.

(B) The information or lack of information contained in the examiner's report is not intended to limit the introduction of evidence regarding the defendant's fitness to proceed.

(f) This subchapter does not preclude the defendant from having an examination conducted by an expert of the defendant's own choosing to determine the defendant's fitness to proceed, and the court shall provide the defendant's expert with a reasonable opportunity to examine the defendant upon a timely request.

(g) When the defendant has previously been found fit to proceed, the court may order a second or subsequent examination to determine a defendant's fitness to proceed only if the court:

(1) Finds reasonable cause to believe that new or previously undiscovered evidence calls into question the factual, legal, or scientific basis of the opinion upon which the previous finding of fitness relied;

(2) Finds reasonable cause to believe that the defendant's mental condition has changed; or

(3) Sets forth in the order a factual or legal basis upon which to order another examination.

(h) Upon completion of examination under this section, the court may enter an order providing for further examination of the defendant and may order the defendant into the custody of the director for further examination and observation if the court determines that commitment and further examination are warranted.

History. Acts 2017, No. 472, § 14.

CASE NOTES

ANALYSIS

Applicability.

Compliance with Former Statute.

Costs.

Examination Report.

Hearing.

Fitness to Proceed.

Request or Motion for Examination.

Supplementary Examination.

Applicability.

Former section was inapplicable to a sentence revocation hearing; thus, the decision whether to provide psychiatric assistance to one facing a revocation hearing, like the decision concerning entitlement to counsel, must be on a case by case basis, and while due process must be accorded the defendant, there is no entitlement to the full range of criminal trial safeguards because the court is not dealing with a person who had yet to be convicted of anything. *Pyland v. State*, 302 Ark. 444, 790 S.W.2d 178 (1990) (decision under prior law).

Compliance with Former Statute.

Where psychiatrist's report raises a reasonable doubt about defendant's competency to stand trial, the trial court should order a full examination and report and, if warranted by the report, should conduct a determination of fitness to proceed pursuant to § 5-2-309. *Jacobs v. State*, 294 Ark.

551, 744 S.W.2d 728 (1988) (decision under prior law).

The appointment of a psychiatrist was not required under former statute; substantial compliance with former statute through an evaluation by a psychologist was enough. *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994) (decision under prior law).

Continuance denied even though psychiatric report had not been filed in strict compliance with former statute where defendant failed to show any prejudice. *Turner v. State*, 326 Ark. 115, 931 S.W.2d 86 (1996) (decision under prior law).

Trial court committed reversible error by failing to immediately suspend the proceedings in defendant's trial for first-degree murder and order a psychiatric evaluation upon defendant's motion requesting that an evaluation be done. *Kelly v. State*, 80 Ark. App. 126, 91 S.W.3d 526 (2002) (decision under prior law).

Trial court erred in deeming defendant's federal mental evaluation sufficient to satisfy Arkansas' mandatory statutory scheme governing state mental evaluations; the trial judge's decision was a gross abuse of his discretion that warranted the granting of a writ of certiorari. *Smith v. Fox*, 358 Ark. 388, 193 S.W.3d 238 (2004) (decision under prior law).

Defendant's conviction for breaking or entering was proper because the trial

court did not err in failing to suspend the proceedings sua sponte and order a second competency hearing based on his actions shortly before and during trial. In part, although defendant appeared to have required restraint at trial because he would stand at inappropriate times, and he asserted that he did not understand the proceedings, those behaviors were entirely consistent with those observed during the videotaped interview following his arrest, after which defendant underwent a psychological examination. *Vilayvanh v. State*, 2012 Ark. App. 561 (2012) (decision under prior law).

Circuit court did not err in ordering a fitness to proceed examination because the State and the circuit court both raised the issue of fitness to proceed, and the circuit court's order clearly stated that it found reasonable suspicion to believe that defendant was not fit to proceed; the statute authorizes the circuit court to raise the issue of a defendant's fitness to proceed and requires it to order the examination once a finding of reasonable suspicion has been made. *Friar v. Erwin*, 2014 Ark. 487, 450 S.W.3d 666 (2014) (decision under prior law).

Costs.

Due process of law does not require the state to furnish expenses for a defendant to shop from doctor to doctor until he finds one who considers him mentally incompetent. *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), cert. denied, 470 U.S. 1085, 105 S. Ct. 1847, 85 L. Ed. 2d 145 (1985) (decision under prior law).

Examination Report.

Where the psychiatrist's report regarding the defendant's fitness to stand trial substantially complied with the requirements of former statute, the trial court did not err in requiring the defendant to proceed to trial, even though the report was not in the exact terms of former statute. *Ball v. State*, 278 Ark. 423, 646 S.W.2d 693 (1983) (decision under prior law).

Denial of the inmate's petition for post-conviction relief under Ark. R. Crim. P. 37.1 was improper as to the competency issue because the supreme court was unable to determine whether there were any results of the mental evaluation of which the parties or the court might have been made aware, whether those results were

contested, or whether there was any other resolution settling the issue of the inmate's competency to proceed and enter his plea. *Sandoval-Vega v. State*, 2011 Ark. 393, 384 S.W.3d 508 (2011) (decision under prior law).

Hearing.

Evidence sufficient to find that there was no prejudicial error in the conduct of the competency hearing. *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980) (decision under prior law).

A pre-trial hearing on the morning of trial, where the court considered the propriety of defendant's withdrawal of his incompetency defense before allowing the case to proceed, complied with procedural due process requirements. *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988) (decision under prior law).

Trial court erred in denying defendant's request for a competency hearing because a hearing was mandatory where defendant plainly took issue with a psychologist's finding that he was competent and requested a hearing. *Simpson v. State*, 2015 Ark. App. 103, 455 S.W.3d 856 (2015) (decision under prior law).

Fitness to Proceed.

Under the statute, the court may raise the incompetency defense on its own at any time it has "reason to doubt" a defendant's fitness to proceed. *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988) (decision under prior law).

Trial court's refusal to halt the proceedings and order a mental evaluation based on defendant's notice was proper where there was no specific assertion that appellant was suffering from a mental disease or defect which affected his competency to proceed, but rather that it was his lack of recollection of the incident that was affecting his capacity to proceed. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992) (decision under prior law).

Trial court did not err in denying defendant's request for a mental evaluation where there was no evidence to suggest that he lacked an appreciation for the seriousness of the charges against him or an ability to assist his attorney in his defense, and the trial court found him fit to proceed. *Bryant v. State*, 94 Ark. App. 387, 231 S.W.3d 91 (2006) (decision under prior law).

Pursuant to defense counsel's motion, the court suspended defendant's trial for a mental-health evaluation and a doctor determined that defendant demonstrated a fully-developed, persecutory-type delusion; however, once defendant's fitness was restored, his prosecution for attempting to commit capital murder could proceed and the court was not required to order a second evaluation when defendant later claimed he was hearing voices. *Steward v. State*, 95 Ark. App. 6, 233 S.W.3d 180 (2006) (decision under prior law).

Where defendant appealed his convictions for violating §§ 5-64-443(c) and 5-64-420(a)(2), the circuit court did not err by denying his motion for a psychological evaluation. Defendant's mere statement that he was depressed was not enough to give the circuit court reason to believe that mental disease or defect would be an issue or to give the circuit court reason to doubt his fitness to proceed. *King v. State*, 2014 Ark. App. 81, 432 S.W.3d 127 (2014) (decision under prior law).

In a probation revocation case, defendant waived an argument relating to whether the trial court should have halted proceedings and ordered an assessment because he never filed notice that he intended to rely on a defense of mental disease or defect or that he was putting

into issue his fitness to proceed; moreover, defense counsel indicated that no issue existed. Even if the trial court had denied a mental evaluation, there was no reversible error in proceeding with the revocation hearing since this was not a criminal trial, and defendant had undergone two evaluations previously. *Ring v. State*, 2014 Ark. App. 169 (2014) (decision under prior law).

Request or Motion for Examination.

A pretrial motion for a psychiatric examination was not sufficient to raise the requisite reasonable or bona fide doubt necessary for the trial judge to make a finding of the defendant's incompetency to stand trial. *Collins v. Housewright*, 664 F.2d 181 (8th Cir. 1981), cert. denied, 455 U.S. 1004, 102 S. Ct. 1639, 71 L. Ed. 2d 872 (1982) (decision under prior law).

Supplementary Examination.

Where the psychiatrist's report told the court virtually nothing and was palpably in noncompliance with former statute and the defendant had a history of mental illness, further observation and examination should have been ordered and his conviction was reversed. *Vance v. State*, 288 Ark. 274, 704 S.W.2d 170 (1986) (decision under prior law).

5-2-328. Examination of defendant — Affirmative defense of lack of criminal responsibility.

(a)(1) Subject to § 5-2-311, if and only if a defendant charged in circuit court files a notice of intent to raise the affirmative defense of lack of criminal responsibility under § 5-2-304, the circuit court shall immediately suspend any further proceedings.

(2) When the defendant files notice under subdivision (a)(1) of this section, then the circuit court may on its own motion or on the motion of the prosecuting attorney or the defense attorney enter an order appointing one (1) or more disinterested experts to examine the defendant with regard to the defense of lack of criminal responsibility.

(3)(A) An examination under this section shall be for a period not exceeding sixty (60) days or a longer period as the Director of the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services or his or her designee determines to be necessary for the purpose of the examination.

(B)(i) A person designated by the circuit court to perform an examination under this section shall file the examination report with the clerk of the circuit court ordering the examination.

(ii) An examination report filed under this subdivision (a)(3)(B) is a public record.

(iii) A copy of the examination report shall be provided by the clerk to the defendant's attorney and the prosecuting attorney.

(b)(1) A uniform order to be used by a circuit court ordering an examination of a defendant's lack of criminal responsibility under this section shall be developed by the Administrative Office of the Courts in conjunction with the following organizations:

(A) The Arkansas Prosecuting Attorneys Association;

(B) The Department of Human Services; and

(C) The Arkansas Public Defender Commission.

(2) The uniform order developed under this subsection shall contain, without limitation, the following information:

(A) The defendant's name, age, gender, and race;

(B) The criminal charges pending against the defendant;

(C) The defendant's attorney's name and address;

(D) The defendant's custody status;

(E) The case number for which the examination was ordered;

(F) A unique identifying number on the incident reporting form as required by the Arkansas Crime Information Center; and

(G) The name of the requesting attorney, if applicable.

(3) The uniform order shall require the prosecuting attorney to provide to the examiner any information relevant to the examination, including without limitation:

(A) The name and address of any attorney involved in the matter;

(B) Information about the alleged offense; and

(C) Any information about the defendant's background that is determined to be relevant to the examination, including the criminal history of the defendant.

(4) The circuit court may require the attorney for the defendant to provide any available information relevant to the examination, including without limitation:

(A) Psychiatric records;

(B) Medical records; or

(C) Records pertaining to treatment of the defendant for substance or alcohol abuse.

(5) After it is developed, a copy of the uniform order under this subsection shall be forwarded to the director.

(6) An examination under this section shall not be conducted without using the uniform order required under this subsection.

(c) An examination report prepared by an examiner ordered under this section shall contain:

(1) A description of the nature of the examination;

(2) An opinion as to whether as the result of a mental disease or defect the defendant at the time of the alleged offense lacked the capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law, an explanation of the examiner's opinion, and the basis of that opinion;

(3) When directed by the circuit court, an opinion as to whether at the time of the alleged offense the defendant lacked the capacity to form a culpable mental state that is required to establish an element of the alleged offense, an explanation of the examiner's opinion, and the basis of that opinion; and

(4) If an examination cannot be conducted because of the unwillingness of the defendant to participate in the examination, an opinion as to whether the unwillingness of the defendant is the result of mental disease or defect.

(d)(1) An examiner appointed under this section to examine a defendant with regard to a defense of lack of criminal responsibility also may be appointed by the circuit court to examine the defendant with regard to the defendant's fitness to proceed under § 5-2-327.

(2) However, the examiner must file with the circuit court separate written reports concerning the defendant's fitness to proceed and lack of criminal responsibility.

(e) Unless otherwise required by this section, an examiner shall not render an opinion or issue a report on the defendant's lack of criminal responsibility if the examiner believes that the defendant is not fit to proceed until the circuit court issuing the order for an examination into the defendant's lack of criminal responsibility makes a determination as to the defendant's fitness to proceed.

(f) A circuit court shall not order the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services to conduct an examination of a defendant's lack of criminal responsibility if a previous examination into the defendant's fitness to proceed has already determined that the defendant does not have a mental disease or defect unless the requesting party can show reasonable cause to believe:

(1) There is evidence of a mental disease or defect that was not fully considered in the previous examination into the defendant's fitness to proceed; or

(2) That the previous opinion that the defendant does not have a mental disease or defect was based on information or facts later shown to be false or unreliable.

(g)(1) This section does not prevent a defendant from having an examination into his or her lack of criminal responsibility conducted by his or her expert or from maintaining a defense of not guilty by reason of a lack of criminal responsibility using testimony from a defense expert or other evidence.

(2) If a defendant wishes to be examined by an expert of his or her own choosing, the circuit court shall provide the expert with reasonable opportunity to examine the defendant upon a timely request.

History. Acts 2017, No. 472, § 15.

CASE NOTES

ANALYSIS

Access to Records.
Compliance with Former Statute.
Costs.
Expert Opinion.
Hearing.
Notice of Intent.
Psychiatrist's Opinion.
Request or Motion for Examination.

Access to Records.

Defendant was denied crucial evidence to aid in his defense when he was not furnished the full records of the state hospital relating to two prior commitments to the state hospital. *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979) (decision under prior law).

Where a court ordered the mental examination of a defendant, it was prejudicial error to deny him access to the reports and records of the state mental hospital and a regional mental health center regarding such examinations. *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981) (decision under prior law).

Compliance with Former Statute.

Evidence was sufficient to find that there was compliance with the statutory requirement as to a mental examination. *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980) (decision under prior law).

The examination, conducted during defendant's stay at the state hospital, by a doctor, who was admittedly a psychologist rather than a psychiatrist, substantially complied with former statute. *Hubbard v. State*, 306 Ark. 153, 812 S.W.2d 107 (1991) (decision under prior law).

Where a defendant is evaluated by the state hospital, such an evaluation complies with the examination requirements of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). *Beard v. State*, 306 Ark. 546, 816 S.W.2d 860 (1991) (decision under prior law).

Where report explicitly referred to the defendant's history of substance abuse, incarceration for delinquency, and psychiatric problems, even though examiner may not have had before him the full medical, psychiatric, and delinquency records of the defendant, report substantially complied with the requirements of

state law. *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992) (decision under prior law).

The trial court did not err in failing to order a psychiatric evaluation by the state hospital where the trial court correctly determined that the evaluation by a local, approved psychologist was a proper alternative and was in compliance with former statute. *Rucker v. State*, 320 Ark. 643, 899 S.W.2d 447 (1995) (decision under prior law).

Continuance denied even though psychiatric report had not been filed in strict compliance with former statute where defendant failed to show any prejudice. *Turner v. State*, 326 Ark. 115, 931 S.W.2d 86 (1996) (decision under prior law).

Trial court committed reversible error by failing to immediately suspend the proceedings in defendant's trial for first-degree murder and order a psychiatric evaluation upon defendant's motion requesting that an evaluation be done. *Kelly v. State*, 80 Ark. App. 126, 91 S.W.3d 526 (2002) (decision under prior law).

Trial court erred in deeming defendant's federal mental evaluation sufficient to satisfy Arkansas' mandatory statutory scheme governing state mental evaluations; the trial judge's decision was a gross abuse of his discretion that warranted the granting of a writ of certiorari. *Smith v. Fox*, 358 Ark. 388, 193 S.W.3d 238 (2004) (decision under prior law).

Costs.

Due process of law does not require the state to furnish expenses for a defendant to shop from doctor to doctor until he finds one who considers him mentally incompetent. *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), cert. denied, 470 U.S. 1085, 105 S. Ct. 1847, 85 L. Ed. 2d 145 (1985) (decision under prior law).

Expert Opinion.

Where defendant was found guilty of first-degree murder and attempted first-degree murder, the trial court did not abuse its discretion in excluding certain expert testimony regarding defendant's capacity to form intent. The expert's report did not state that defendant lacked the capacity to form intent, only that it was impacted or impaired, and the expert

also opined that defendant's psychotic disorder did not render him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Furthermore, there was ample evidence of purposeful conduct where defendant left a bar and returned with a shotgun that he used against the victims. *Edwards v. State*, 2015 Ark. 377, 472 S.W.3d 479 (2015) (decision under prior law).

Hearing.

A pre-trial hearing on the morning of trial, where the court considered the propriety of defendant's withdrawal of his incompetency defense before allowing the case to proceed, complied with procedural due process requirements. *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988) (decision under prior law).

Notice of Intent.

Circuit court acted without jurisdiction in ordering defendant to submit to a criminal responsibility examination because defendant had not filed a notice of intent to raise the defense of not guilty for reason

of mental disease or defect. *Friar v. Erwin*, 2014 Ark. 487, 450 S.W.3d 666 (2014) (decision under prior law).

Psychiatrist's Opinion.

While psychiatrist's opinion was a conditional one, it was nonetheless an opinion as to defendant's "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" at the time the offense was committed. *Walker v. State*, 303 Ark. 401, 797 S.W.2d 447 (1990) (decision under prior law).

Former statute required no unequivocal or conclusive opinion, but provided only that such reports contain some opinion as to the extent to which the defendant's mental capacity was impaired. *Williams v. State*, 320 Ark. 67, 894 S.W.2d 923 (1995) (decision under prior law).

Request or Motion for Examination.

The time necessary to complete a mental examination requested by a defendant is excluded from the one-year period for speedy trial. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004) (decision under prior law).

5-2-329. Data to be maintained by the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services.

(a)(1) The Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services shall maintain a database of all examinations of defendants performed under this subchapter.

(2) The database shall be maintained in a manner that enables it to generate reports and compile data with or without personal identifying information.

(3) The database shall contain without limitation:

(A) The defendant's information on the uniform order required under § 5-2-327 or § 5-2-328;

(B) The name of the judge who ordered the examination, if known;

(C) The name of the attorney who requested the examination, if known;

(D) The name of the examiner who conducted the examination;

(E) The result of the examination;

(F) If the defendant was examined regarding his or her fitness to proceed, whether the defendant had his or her fitness to proceed restored; and

(G) If the defendant was found not guilty or acquitted because of the affirmative defense of lack of criminal responsibility, the defendant's progress through his or her commitment and conditional release.

(b) The database should be designed in a manner that allows reports to be generated for the General Assembly, researchers, and the public to track the efficiency and effectiveness of the examination process and the restoration and treatment programs of the division without invading the privacy of individual defendants and patients.

History. Acts 2017, No. 472, § 16.

5-2-330. Examination by Division of Correction prohibited.

A defendant committed to and under the supervision of the Division of Correction who is charged in circuit court shall not undergo an examination or observation conducted under this subchapter by a psychiatrist or other mental health employee of the division to determine the mental condition of the defendant.

History. Acts 2017, No. 472, § 17; substituted “Division of Correction” for 2019, No. 910, § 645. “Department of Correction” in the section

Amendments. The 2019 amendment heading and the section.

5-2-331. Cost of mental health services, examination, and treatment of defendant.

(a) A person or entity that provides treatment or other mental health services under this subchapter may impose a charge for the cost of the treatment or other mental health services rendered.

(b) A charge for the cost of treatment or other mental health services under this section may not exceed the actual cost of the treatment or other mental health services provided.

(c)(1) The Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services shall promulgate rules establishing reasonable charges for the cost of treatment or other mental health services under this section.

(2) Rules establishing reasonable charges for the cost of treatment or other mental health services under this section shall provide for waiving or postponing the collection of the charges based on:

(A) Clinical considerations;

(B) The defendant’s inability to pay; or

(C) A court determination that the defendant is wholly or partly indigent and qualifies for the appointment of an attorney under § 16-87-213.

History. Acts 2019, No. 567, § 1.

SUBCHAPTER 4 — PARTIES TO OFFENSES

5-2-402. Liability for conduct of another generally.

CASE NOTES

ANALYSIS

Accomplice/Principal Distinction.

Accomplices.

Evidence.

Instructions.

Accomplice/Principal Distinction.

It was defendant's brother who fired the shot that killed the victim, and although defendant claimed the State failed to prove it was his conscious object to assist his brother, the law in Arkansas made no distinction between the criminal liability of a principal and an accomplice; defendant drove around with the stated purpose to assist in hunting down and killing the victim, and thus the evidence supported his convictions of first-degree murder and committing a terroristic act, and the circuit court properly denied his motions for directed verdict. *Starling v. State*, 2015 Ark. App. 429, 468 S.W.3d 294 (2015).

Accomplices.

Evidence was sufficient to convict defendant of theft as an accomplice because defendant asked the complainant to give the back-seat passenger a ride; the back-seat passenger took the complainant's wallet and the \$3700 it contained while defendant struggled with the complainant to take her cell phone; it was up to the circuit court to decide whether defendant and the back-seat passenger acted in concert to divert the complainant's attention and steal her money; defendant's account of events differed so significantly from the testimony of other witnesses that the trial court, as the trier of fact, could readily discount her entire testimony; and her attempt to flee from the crime scene was relevant to the issue of guilt. *Cosey v. State*, 2014 Ark. App. 441, 439 S.W.3d 731 (2014).

While no witness directly identified defendant as being the actual robber, a person was criminally liable for the conduct of another when he was an accomplice; defendant's car was stopped driving away

from a robbery, he had two passengers with him, inside the car was the same amount of money that had been stolen, and the clothing in the car matched the description of what the robber wore, and the jury was permitted to weigh the evidence in reaching its guilty verdict. *Richardson v. State*, 2014 Ark. App. 679, 449 S.W.3d 718 (2014).

In a case where defendant was convicted of two counts of aggravated robbery, there was sufficient evidence presented to corroborate the accomplice's testimony because defendant told a detective he was at the store on the date of the robbery; surveillance tapes showed defendant, co-defendant, and the accomplice in the store at the same time as the victim, leaving the store immediately after the victim, and leaving the parking lot right behind the victim; defendant's mother testified that the vehicle police were searching for in connection with the aggravated robberies belonged to defendant; and, at trial, the victim's sister identified defendant as the person who committed the aggravated robberies with co-defendant. *Foster v. State*, 2017 Ark. App. 63, 510 S.W.3d 782 (2017).

Evidence.

There was substantial evidence to support convictions for two aggravated-robbery counts based on accomplice liability where defendant was in a car moving away from the robbery scene, he was found with roughly the same amount of money that was stolen in the robbery, and he used a false name. Moreover, one of the vehicle's passengers was wearing clothing that matched the description of the perpetrator. *Davis v. State*, 2013 Ark. App. 658, 430 S.W.3d 190 (2013).

Because there was evidence that defendant's accomplice caused injury to the victim using a deadly weapon, and because the jury was instructed on accomplice liability, there was sufficient evidence presented to support defendant's second-degree battery conviction as the baseball bat swung by the accomplice,

while not specifically designed for the purpose of inflicting death or serious physical injury, could clearly be used in a manner capable of causing death or serious physical injury when it was swung at the victim with the intent to strike her, and did strike her and fracture her hand. *Wimbley v. State*, 2014 Ark. App. 405, 437 S.W.3d 132 (2014).

Trial court did not err in denying defendant's motions for a directed verdict based on the ground that there was insufficient evidence to corroborate an accomplice's testimony where defendant admitted that he had been in the car with the individuals who carried out the robberies, a video showed him on a shopping trip to buy hoodies one hour before the armed robberies, and the act of buying the hoodies was a substantial step toward commission of the crimes. *Willis v. State*, 2018 Ark. App. 199, 546 S.W.3d 550 (2018).

Substantial evidence supported defendant's convictions as an accomplice to first-degree murder and aggravated robbery as defendant was in the proximity of the crime, a video put defendant inside

the victim's home shortly before the video tended to establish the victim had been killed, and he had the opportunity to aid in the commission of the crime. *Jackson v. State*, 2018 Ark. App. 330, 552 S.W.3d 55 (2018).

Instructions.

Because the status of the driver of the car and the juvenile who gave directions to the victim's house as accomplices was a mixed question of law and fact, the trial court properly did not instruct the jury that they were accomplices as a matter of law as agreeing to drive defendant and the accomplice to the victim's house with no questions asked did not conclusively show that the driver knew about or participated in the robbery or battery; it was the role of the jury to determine whether the juvenile had to have known that the robbery and battery were about to occur; and no testimony showed beyond dispute that either the driver or the juvenile knew of defendant's plan to rob the victim or that they encouraged him to shoot the victim. *West v. State*, 2017 Ark. App. 416, 530 S.W.3d 355 (2017).

5-2-403. Accomplices.

CASE NOTES

ANALYSIS

Accomplice Testimony.

Evidence.

Evidence Sufficient.

Instructions.

Liability.

Accomplice Testimony.

Evidence to corroborate a witness's testimony was not required because defendant failed to demonstrate that the witness was an accomplice; first, the witness testified that he was merely present in the vehicle and this testimony was unrefuted, second, the circuit court did not find him to be an accomplice at law, and finally, the appellate court had no knowledge of whether the jury decided if the witness was an accomplice. *Farmer v. State*, 2019 Ark. App. 331 (2019).

Even assuming the witness was an accomplice, there was independent evidence tending to connect defendant with attempted capital murder, unlawful dis-

charge of a firearm from a vehicle, and fleeing, as his letters and call to the witness were consistent with testimony that defendant was the shooter, and the jury could have found that defendant's alleged actions in firing the assault rifle at the officer and telling the driver to go aided and encouraged the driver in fleeing from the officer. *Farmer v. State*, 2019 Ark. App. 331 (2019).

Evidence.

There was substantial evidence to support convictions for two aggravated-robbery counts based on accomplice liability where defendant was in a car moving away from the robbery scene, he was found with roughly the same amount of money that was stolen in the robbery, and he used a false name. Moreover, one of the vehicle's passengers was wearing clothing that matched the description of the perpetrator. *Davis v. State*, 2013 Ark. App. 658, 430 S.W.3d 190 (2013).

Appellant, a juvenile, was improperly

adjudicated delinquent of the crime of accomplice to theft of property; there was no direct evidence that appellant took a phone, and circumstantial evidence did not exclude every other reasonable hypothesis consistent with innocence. There was no evidence that he solicited, advised, encouraged, or coerced anyone to take the phone, or that he aided, agreed to aid, or attempted to aid another person in planning or committing a theft, and the possibility that someone else took the phone remained. *J.J. v. State*, 2014 Ark. App. 267 (2014).

Evidence was sufficient to convict defendant of eight counts of theft for stealing horses, a horse trailer, and tack from a university and to deny her motion for directed verdict because several witnesses testified that defendant planned the thefts, gave a map of the stables to her boyfriend and his friend, provided the use of her truck for the thefts, assisted her boyfriend and his friend in hiding the trailer at her aunt and uncle's home, directed her boyfriend to kill one horse and hide the remaining four horses, and secured a place for her boyfriend and his friend to hide at her daughter's house. *Cox v. State*, 2014 Ark. App. 321 (2014).

Trial court properly found defendant guilty as an accomplice to the crime of kidnapping because defendant not only accompanied her son to the victim's apartment, she also assisted him in beating her, encouraged him to "get" her, he forcibly exposed the victim to defendant, choked her, and then forced her down the hallway into a bedroom where he raped her orally and vaginally. *Singleton-Harris v. State*, 2014 Ark. App. 436, 439 S.W.3d 720 (2014).

Evidence was sufficient to convict defendant of theft as an accomplice because defendant asked the complainant to give the back-seat passenger a ride; the back-seat passenger took the complainant's wallet and the \$3700 it contained while defendant struggled with the complainant to take her cell phone; it was up to the circuit court to decide whether defendant and the back-seat passenger acted in concert to divert the complainant's attention and steal her money; defendant's account of events differed so significantly from the testimony of other witnesses that the trial court, as the trier of fact, could readily discount her entire testimony; and her

attempt to flee from the crime scene was relevant to the issue of guilt. *Cosey v. State*, 2014 Ark. App. 441, 439 S.W.3d 731 (2014).

Defendant juvenile attempted to aid her boyfriend by shielding his actions and then looking around, she knew he was going to steal, and her actions aided the commission of the theft; the court affirmed defendant's delinquency adjudication for being an accomplice to theft of property based on the sufficient evidence. *H.V. v. State*, 2014 Ark. App. 607, 447 S.W.3d 619 (2014).

While no witness directly identified defendant as being the actual robber, a person was criminally liable for the conduct of another when he was an accomplice; defendant's car was stopped driving away from a robbery, he had two passengers with him, inside the car was the same amount of money that had been stolen, and the clothing in the car matched the description of what the robber wore, and the jury was permitted to weigh the evidence in reaching its guilty verdict. *Richardson v. State*, 2014 Ark. App. 679, 449 S.W.3d 718 (2014).

Evidence was sufficient to support convictions for aggravated robbery and capital murder because defendant's intent was inferred from the actions of his accomplice; defendant's statement to police provided direct evidence of the accomplice's intent to commit an aggravated robbery, and his account of how the accomplice murdered the victim by shooting her in the forehead was substantial evidence of causing the death of a person under circumstances manifesting extreme indifference to the value of human life. There was ample proof of defendant's participation as he accompanied others to the victim's residence, persuaded her to open the door, helped search the residence, and collected and kept his own share of the property that was stolen. *Conway v. State*, 2016 Ark. 7, 479 S.W.3d 1 (2016).

Evidence Sufficient.

Evidence was sufficient to convict defendant of aggravated residential burglary because defendant was an accomplice in the aggravated residential burglary, and, thus, it was irrelevant whether defendant entered the house or not as her accomplice clearly entered the house; defendant was in the vicinity of the crime, she was hold-

ing a knife, and, according to the victim's testimony, she ran toward the victim with the knife after the victim chased the accomplice out of his house; and the trial court was not required to believe defendant's version of events that the accomplice never asked defendant to assist with the crime, and her testimony that she would never use a knife in a violent manner. *Wilson v. State*, 2016 Ark. App. 218, 489 S.W.3d 716 (2016).

There was sufficient evidence that defendant was an accomplice to the crimes of aggravated robbery and capital murder as defendant admitted that he and the codefendants sat in a car planning the theft of beer from a gas station and convenience store and surveillance videos showed that defendant and a codefendant rushed into the store together, that codefendant shot the store clerk, and that defendant attempted to open the cash register, appeared to look around for something to steal, and searched the victim's pockets before fleeing. *Williams v. State*, 2017 Ark. 287, 528 S.W.3d 839 (2017).

In a case where defendant was convicted of two counts of aggravated robbery, there was sufficient evidence presented to corroborate the accomplice's testimony because defendant told a detective he was at the store on the date of the robbery; surveillance tapes showed defendant, codefendant, and the accomplice in the store at the same time as the victim, leaving the store immediately after the victim, and leaving the parking lot right behind the victim; defendant's mother testified that the vehicle police were searching for in connection with the aggravated robberies belonged to defendant; and, at trial, the victim's sister identified defendant as the person who committed the aggravated robberies with codefendant. *Foster v. State*, 2017 Ark. App. 63, 510 S.W.3d 782 (2017).

Evidence was sufficient to convict under § 5-14-103 where the victim testified that the juvenile and codefendant had forced her into a fieldhouse and that codefendant had touched her on the inside with his finger while the juvenile restrained her by the waist and grabbed her hands, and there was nothing inherently improbable or physically impossible about the testimony. *K.B. v. State*, 2017 Ark. App. 478, 531 S.W.3d 420 (2017).

Substantial evidence supported defendant's convictions as an accomplice to first-degree murder and aggravated robbery as defendant was in the proximity of the crime, a video put defendant inside the victim's home shortly before the video tended to establish the victim had been killed, and he had the opportunity to aid in the commission of the crime. *Jackson v. State*, 2018 Ark. App. 330, 552 S.W.3d 55 (2018).

Evidence was sufficient to convict defendant of aggravated robbery either as a principal or as an accomplice because defendant's boyfriend told her they were going to pick up the victim and that he intended to beat him up and take anything that the victim had on him; despite knowing the boyfriend's purpose, defendant still agreed to drive him; substantial corroborating evidence connecting defendant to the crime included two interviews she gave to the police and her written statement, which were admitted at trial; and the victim's death made the offense an aggravated robbery regardless of her knowledge of whether a gun might be used. *Vaughan v. State*, 2018 Ark. App. 439, 555 S.W.3d 922 (2018).

Instructions.

Trial court did not err in instructing the jury on accomplice liability during defendant's murder and kidnapping trial because testimony from five witnesses supported the theory that he was either a principal or an accomplice with his son; defendant's cell mate testified that defendant confessed to killing one victim and concealing the other three homicides from law enforcement. *Green v. State*, 2013 Ark. 497, 430 S.W.3d 729 (2013).

Liability.

Because the juvenile was not "charged with supervision of a minor" as set forth in § 5-27-205, she was not in the class of persons who could commit the offense of first-degree endangering the welfare of a minor, and thus she could not be principally culpable for committing the offense. The juvenile's sister, and not the juvenile, was identified as the babysitter of the one-year-old child. And because the juvenile, and not her sister, was the person who sparked the stun gun at the child, she could not be charged as an accomplice and therefore her adjudication was reversed.

K.F. v. State, 2019 Ark. App. 312, 578 S.W.3d 324 (2019).

SUBCHAPTER 6 — JUSTIFICATION

SECTION.	SECTION.
5-2-607. Use of deadly physical force in defense of a person.	facility or custody of correctional officer.
5-2-613. Use of physical force to prevent escape from correctional	5-2-621. [Transferred.]

Effective Dates. Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled ‘Funding and

classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-2-601. Definitions.

CASE NOTES

Cited: Stalnaker v. State, 2014 Ark. App. 412, 437 S.W.3d 700 (2014).

5-2-604. Choice of evils.

RESEARCH REFERENCES

ALR. Application of Defense of Necessity to Murder, 23 A.L.R.7th Art. 1 (2018).

5-2-605. Use of physical force generally.

RESEARCH REFERENCES

ALR. Application of Defense of Necessity to Murder, 23 A.L.R.7th Art. 1 (2018).

CASE NOTES

Discipline. Evidence supported the second-degree domestic battering conviction under § 5-	26-304 where neighbors heard sounds of loud banging and yelling, and defendant beat the child with a leather belt repeat-
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edly for at least five minutes, causing welts and lashings. *Jefferson v. State*, 2017 Ark. App. 492, 532 S.W.3d 75 (2017).

5-2-606. Use of physical force in defense of a person.

RESEARCH REFERENCES

ALR. Application of Defense of Necessity to Murder, 23 A.L.R.7th Art. 1 (2018).

CASE NOTES

Evidence.

Trial court did not abuse its discretion in refusing to give defendant's proffered justification-defense jury instruction because this section and § 5-2-607 and the model jury instructions demonstrated

that only the deadly physical force model jury instruction was appropriate, if any instruction was appropriate. *Stalnaker v. State*, 2014 Ark. App. 412, 437 S.W.3d 700 (2014).

5-2-607. Use of deadly physical force in defense of a person.

(a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:

(1) Committing or about to commit a felony involving force or violence;

(2) Using or about to use unlawful deadly physical force; or

(3) Imminently endangering the person's life or imminently about to victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.

(b) A person may not use deadly physical force in self-defense if the person knows that he or she can avoid the necessity of using deadly physical force:

(1)(A) By retreating.

(B) However, a person is not required to retreat if the person is:

(i) Unable to retreat with complete safety;

(ii) In the person's dwelling or on the curtilage surrounding the person's dwelling and was not the original aggressor; or

(iii) A law enforcement officer or a person assisting at the direction of a law enforcement officer; or

(2) With complete safety by surrendering possession of property to a person claiming a lawful right to possession of the property.

(c) As used in this section:

(1) "Curtilage" means the land adjoining a dwelling that is convenient for residential purposes and habitually used for residential purposes, but not necessarily enclosed, and includes an outbuilding that is directly and intimately connected with the dwelling and in close proximity to the dwelling; and

(2) "Domestic abuse" means:

(A) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members; or

(B) Any sexual conduct between family or household members, whether minors or adults, that constitutes a crime under the laws of this state.

History. Acts 1975, No. 280, § 507; A.S.A. 1947, § 41-507; Acts 1997, No. 1257, § 1; 2007, No. 111, § 1; 2009, No. 748, § 2; 2015, No. 828, § 1.

Amendments. The 2015 amendment deleted “with complete safety” at the end

of the introductory language of (b); inserted present (b)(1)(B)(i) and redesignated the remaining subdivisions accordingly; and substituted “With complete safety by” for “By” in (b)(2).

RESEARCH REFERENCES

ALR. Application of Defense of Necessity to Murder, 23 A.L.R.7th Art. 1 (2018).

CASE NOTES

ANALYSIS

Directed Verdict.

Evidence.

Instructions.

Prior Violent Acts of Victims.

Requirement to Retreat.

Self-Defense.

Directed Verdict.

Defendant convicted of murder did not preserve for review the denial of his directed verdict motion; in his motion, defendant failed to identify specifically how the State’s proof was insufficient to negate defendant’s claim of self-defense—e.g., whether the State failed to show that defendant lacked a reasonable belief that the victims were about to use deadly force; whether the State failed to demonstrate that defendant could not have retreated safely; or whether the State failed to demonstrate that the victims were not committing, or were about to commit, a felony involving force or violence. *Kinsey v. State*, 2016 Ark. 393, 503 S.W.3d 772 (2016).

Evidence.

Substantial evidence existed to support a second-degree murder conviction because defendant’s justification defense could have been reasonably rejected; the jury could have credited testimony indicating that defendant walked towards the

victim holding a gun after being told that the girls present did not want to fight. It was up to the jury to determine if it was reasonable for defendant to believe that she was in danger of being killed or suffering great bodily injury. *Moody v. State*, 2014 Ark. App. 538, 444 S.W.3d 389 (2014).

Evidence was sufficient to convict defendant of second-degree murder where the State’s evidence rebutted defendant’s claim of justification; defendant stabbed the victim, threw his knife in a creek, fled the scene, failed to alert law enforcement, and threw away his clothes in a dumpster at a hotel. Moreover, a jailhouse witness testified that defendant had stated that the crime was not committed in self-defense; rather, defendant stated he killed the victim during an attempted theft. *Bailey v. State*, 2016 Ark. App. 209, 489 S.W.3d 203 (2016).

Evidence was sufficient to support a conviction for second-degree murder because defendant was not justified in using deadly force against the victim based on a belief that the victim was reaching for a gun; defendant was the first and only person to draw a weapon, and surveillance video showed that defendant was the initial aggressor and failed to retreat. *Wade v. State*, 2017 Ark. App. 157, 516 S.W.3d 772 (2017).

In a second-degree murder case, there was no abuse of discretion in granting the

State's motion to exclude testimony from the medical examiner that the victim had illegal controlled substances in his system at the time of his death because the report's probative value was far outweighed by the danger of unfair prejudice. The toxicology report was irrelevant because defendant did not know at the time of the shooting that the victim had ingested drugs; moreover, defendant was not prejudiced by the ruling because he presented proof of the victim's erratic and aggressive behavior. *Wade v. State*, 2017 Ark. App. 157, 516 S.W.3d 772 (2017).

Substantial evidence supported defendant's conviction for first-degree murder under the felony murder rule because defendant shot and killed a responding auxiliary sheriff's deputy while defendant was hiding two hours after fleeing from a residential burglary with items taken in the burglary. Furthermore, the jury reasonably found that defendant was not justified in his use of deadly force. *Kauffeld v. State*, 2017 Ark. App. 440, 528 S.W.3d 302 (2017).

Trial court did not err in allowing pictures defendant took on the victim's cell phone after the victim was dead because the pictures went to defendant's state of mind and were relevant to the State's theory that he committed first-degree murder and did not kill the victim in self-defense. *Roberts v. State*, 2018 Ark. App. 332, 552 S.W.3d 446 (2018).

Instructions.

Trial court did not abuse its discretion in refusing to give defendant's proffered justification-defense jury instruction because § 5-2-606 and this section and the model jury instructions demonstrated that only the deadly physical force model jury instruction was appropriate, if any instruction was appropriate. *Stalnaker v. State*, 2014 Ark. App. 412, 437 S.W.3d 700 (2014).

In a second-degree murder case, a trial court did not err by refusing to give a proffered instruction on justification because the grassy area where defendant confronted the victim and shot her was not properly considered curtilage. *Moody v. State*, 2014 Ark. App. 538, 444 S.W.3d 389 (2014).

Circuit court did not err in refusing to give defendant's proffered instruction on self-defense where the model jury instruc-

tion was a complete statement of the law; the appellate court rejected defendant's argument that the model jury instruction incorrectly allocated the burden of proof on self-defense to the defendant. *Kinsey v. State*, 2016 Ark. 393, 503 S.W.3d 772 (2016).

Defendant's proffered instruction on self-defense was not a complete instruction of the law because it presumed that justification is an element of the offense when that is a question for the jury. *Kinsey v. State*, 2016 Ark. 393, 503 S.W.3d 772 (2016).

Prior Violent Acts of Victims.

In a murder trial where defendant asserted self-defense and was convicted of manslaughter, evidence of specific instances of the victim's past violent conduct was not relevant for the purpose for which it was offered because events of which the defendant was not aware could not have affected his state of mind. Therefore, the exclusion of the evidence was not arbitrary and did not violate defendant's constitutional right to present a complete defense. *Schnarr v. State*, 2017 Ark. 10 (2017).

In a murder trial where defendant asserted self-defense and was convicted of manslaughter, the circuit court did not err in excluding evidence of specific instances of the victim's past violent conduct where defendant had no knowledge of that past conduct and the purpose for which the evidence was offered pertained to defendant's state of mind. *Schnarr v. State*, 2017 Ark. 10 (2017).

When self-defense is asserted, the evidentiary rules governing the admissibility of specific instances of the victim's past violent conduct are Ark. R. Evid. 404(a)(2) and 405. *Schnarr v. State*, 2017 Ark. 10 (2017).

In a murder trial where defendant asserted self-defense and was convicted of manslaughter, defendant's contention that evidence of specific instances of the victim's past violent conduct was admissible to corroborate defendant's testimony that the victim was the aggressor was not made below and thus was not reviewable on appeal. *Schnarr v. State*, 2017 Ark. 10 (2017).

Trial court did not err in limiting defendant's presentation of prior violent altercations between him and the victim, his

brother, to those that occurred within five years of the murder because that was when defendant began to interact with the victim after a 35-year absence; defendant was still permitted to introduce multiple recent instances in which the victim had attacked him, and thus imposing the five-year limitation was harmless and did not prejudice defendant. *Roberts v. State*, 2018 Ark. App. 332, 552 S.W.3d 446 (2018).

Requirement to Retreat.

Defendant's argument focused on her belief that she was in danger of great bodily harm, but it disregarded the requirement in this section that she attempt to retreat if she was not at her own residence and could do so safely; it was this requirement that the trial court found defendant was unable to satisfy in her defense of justification, which was not error. *Graves v. State*, 2019 Ark. App. 293 (2019).

Self-Defense.

During petitioner's capital murder trial, counsel did not perform deficiently by failing to present the affirmative defense of self-defense; evidence showed that petitioner initiated the encounter on the day of the shooting by traveling to his former wife's home while carrying a firearm. *Dansby v. Hobbs*, 766 F.3d 809 (8th Cir.

2014), cert. denied, — U.S. —, 136 S. Ct. 297, 193 L. Ed. 2d 46 (2015).

Trial court did not err in refusing to give a justification of deadly force jury instruction as defendant offered an incorrect version of the law. *Gould v. State*, 2014 Ark. App. 543, 444 S.W.3d 408 (2014).

Defendant argued that because there were only two witnesses to the actual shooting, and one was not credible and another's testimony was that the victim was the aggressor, the State failed to disprove the justification defense beyond a reasonable doubt, but this argument was rejected; because there was evidence from which the jury could have found defendant not to be justified in his use of deadly force in this instance, the court affirmed on this point. *Lewis v. State*, 2014 Ark. App. 730, 451 S.W.3d 591 (2014).

Petitioner was not entitled to a writ of error coram nobis on the ground that the prosecutor withheld material exculpatory evidence in violation of Brady because the presentation of the witness's account of events would not have changed the outcome of the trial by establishing that petitioner fired in self-defense; petitioner admitted that he did not see a gun in the victim's possession and that he could have retreated. *Stenhouse v. State*, 2016 Ark. 295, 497 S.W.3d 679 (2016), cert. denied, — U.S. —, 137 S. Ct. 837, 197 L. Ed. 2d 75 (2017).

5-2-613. Use of physical force to prevent escape from correctional facility or custody of correctional officer.

(a) Unless the correctional officer knows or reasonably should know that a prisoner is charged with or has been convicted of only a misdemeanor, a correctional officer employed by the Division of Correction or by a private contractor in a correctional facility housing inmates for the division or a city or county correctional officer employed in a correctional facility or jail is justified in using deadly physical force when and to the extent that the correctional officer reasonably believes the use of deadly physical force is necessary to prevent the escape of a prisoner from:

- (1) A correctional facility; or

(2) Custody of a correctional officer outside a correctional facility for any purpose.

(b) If the correctional officer knows or reasonably should know that a prisoner is charged with or has been convicted of only a misdemeanor, only nondeadly physical force may be used.

History. Acts 1975, No. 280, § 513; A.S.A. 1947, § 41-513; Acts 1997, No. 525, § 1; 2019, No. 910, § 646.

Amendments. The 2019 amendment substituted “Division of Correction” for “Department of Correction” in (a).

5-2-614. Use of reckless or negligent force.

CASE NOTES

ANALYSIS

Instructions.
Reasonable Belief.

Instructions.

Circuit properly refused to give an instruction based on imperfect self-defense where there was no evidence that the victim appeared to be armed or that he had made any threats to indicate that he was armed, and defendant denied that the victim had threatened him with bodily harm. *Schnarr v. State*, 2017 Ark. 10 (2017).

Circuit court properly denied appellant’s petition for postconviction relief because trial counsel was not ineffective for failing to request a non-model jury instruction on imperfect self-defense pursuant to this section. *Nelson v. State*, 2018 Ark. App. 583, 566 S.W.3d 530 (2018).

Reasonable Belief.

In a trial for manslaughter under § 5-10-104, the circuit court erred when it did not instruct the jury on justification because, under this section, if defendant was reckless or negligent in forming the belief that force was necessary, then, and only then, was the defense unavailable; how-

ever, if defendant was not reckless or negligent in forming his belief, the defense was available, and that was a decision for the jury. *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308 (2018).

Denial of the justification is not triggered until culpability is determined. Prohibiting a justification defense because the charged offense involves recklessness would be premature as it is for the jury to determine culpability. *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308 (2018).

Plain language of this section provides that once the jury determines whether a defendant has been reckless or negligent in forming the belief that force is necessary, then the applicability of the justification defense is determined. *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308 (2018).

Justification is not an affirmative defense that must be pleaded but becomes a defense when any evidence tending to support its existence is offered to support it; a justification, such as self-defense, is considered an element of the offense under § 5-1-102(5)(C), and once raised, it must be disproved by the prosecution beyond a reasonable doubt. *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308 (2018).

5-2-621. [Transferred.]

Publisher’s Notes. Former § 5-2-621 was renumbered as § 16-120-303 in 2016

by the Arkansas Code Revision Commission.

CHAPTER 3

INCHOATE OFFENSES

SUBCHAPTER 2 — CRIMINAL ATTEMPT

5-3-201. Conduct constituting attempt.

CASE NOTES

ANALYSIS

Attempted Burglary.
 Attempted Capital Murder.
 Attempted Murder.
 Attempted Rape.
 Attempted Reckless Manslaughter.
 Attempted Robbery.
 Lesser Included Offenses.

Attempted Burglary.

Circuit court erred in convicting defendant of attempted residential burglary; even though he was caught unlawfully entering his girlfriend's former residence while holding a small bag and fled when her daughter yelled at him, there was no evidence that he did so with the purpose or specific intent of committing therein a theft of property. There was no evidence to show whether the bag was empty or contained something, defendant was not a complete stranger to the daughter or to the residence, the illegal entry was in the middle of the day, and the window was known to not close properly. *Whitworth v. State*, 2017 Ark. App. 462, 531 S.W.3d 407 (2017).

Attempted Capital Murder.

Evidence was sufficient to sustain defendant's attempted capital murder convictions because, after shooting the officer in the shoulder, defendant fired five additional shots at the fleeing officers; the officer's pat-down of defendant showed that he was unarmed, but he had the wherewithal to run into the apartment and retrieve his gun. *Inthisone v. State*, 2013 Ark. App. 482 (2013).

Even assuming the witness was an accomplice, there was independent evidence tending to connect defendant with attempted capital murder, unlawful discharge of a firearm from a vehicle, and fleeing, as his letters and call to the wit-

ness were consistent with testimony that defendant was the shooter, and the jury could have found that defendant's alleged actions in firing the assault rifle at the officer and telling the driver to go aided and encouraged the driver in fleeing from the officer. *Farmer v. State*, 2019 Ark. App. 331 (2019).

Attempted Murder.

There was sufficient evidence to convict defendant of attempted capital murder, where the evidence showed defendant threatened to kill the victim and made the conscious decision to attack him with a semiautomatic gun, but the weapon jammed when defendant pointed it at the victim in order to shoot and kill him, and the victim escaped before defendant could attempt to fire again. *Hill v. State*, 2015 Ark. App. 700, 478 S.W.3d 225 (2015).

Attempted Rape.

Conviction for aggravated residential burglary was reversed because there was insufficient evidence that defendant attempted to inflict a serious physical injury under § 5-39-204(a)(2). Serious physical injury could be inflicted during a sexual assault, but under current Arkansas law, a sexual assault does not necessarily constitute a serious physical injury; even assuming that defendant did intend to sexually assault the victim, defendant's intention, combined with his grabbing her shoulder and causing a minor scratch to her baby's face, did not constitute a substantial step toward inflicting a serious physical injury, as defined by § 5-1-102. *Inskeep v. State*, 2016 Ark. App. 135, 484 S.W.3d 709 (2016).

Attempted Reckless Manslaughter.

Trial court did not err by failing to instruct on attempted reckless manslaughter as a lesser-included offense of attempted second-degree murder because

the crime of attempted reckless manslaughter is inherently contradictory. The attempted offense involved an intentional act, and it would have been illogical to ask the jury to find that defendant intended to act recklessly or that he purposely engaged in conduct that was a substantial step in a course of conduct intended to culminate in acting recklessly. Even if the instruction was based on sound law, there was no rational basis for giving it in this case where defendant's actions in running over people were intentional, regardless of whether he intended to bring about the particular result of death. *Allen v. State*, 2015 Ark. App. 360, 465 S.W.3d 9 (2015).

Attempted Robbery.

Substantial evidence supported defendant's capital murder conviction under § 5-10-101, as there was sufficient evi-

dence that defendant committed the underlying felony of attempted robbery under § 5-12-102 and this section; defendant approached the victim with a weapon, demanded his phone, and pointed the weapon at the victim at point-blank range. *Hicks v. State*, 2017 Ark. 262, 526 S.W.3d 831 (2017).

Lesser Included Offenses.

In a theft trial, it was not necessary to instruct the jury on the lesser-included offense of attempted theft because defendant clearly exercised unauthorized control over a store's property when he threw it over a fence into an area off the store's parking lot; it was not necessary that defendant also "take" the property to complete the crime. *Cole v. State*, 2013 Ark. App. 492 (2013).

SUBCHAPTER 4 — CRIMINAL CONSPIRACY

5-3-401. Conduct constituting conspiracy.

CASE NOTES

Evidence.

Evidence was sufficient to convict defendant of conspiracy to deliver methamphetamine as the jury could infer that an agreement existed between defendant and the individual who sold the drugs to a confidential informant; defendant possessed a large amount of methamphetamine in his truck, he possessed the money that the confidential informant had previously given to the seller, the seller referred to defendant as his source, and defendant possessed digital scales with the methamphetamine. *Vonholt v. State*, 2018 Ark. App. 53, 540 S.W.3d 312 (2018).

Substantial evidence supported defendant's conviction for conspiracy to commit rape because there was evidence that he made a plan with an undercover officer posing as a father to rape his 13-year-old daughter, and defendant took overt steps in furtherance of the plan; the sexually graphic language used by defendant left no doubt that he wanted to have sex with the father's daughter, plus defendant showed up at the meeting place at the appointed time in the vehicle he said he would be driving, and he had two gifts in his vehicle for the daughter. *Frederic v. State*, 2018 Ark. App. 449, 560 S.W.3d 494 (2018).

5-3-405. Renunciation of criminal purpose.

RESEARCH REFERENCES

ALR. Imprisonment as Constituting Withdrawal from Conspiracy. 100 A.L.R.6th 335 (2014).

CHAPTER 4
DISPOSITION OF OFFENDERS

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. FINES, COSTS, AND RESTITUTION.
- 3. SUSPENSION OR PROBATION.
- 4. IMPRISONMENT.
- 5. EXTENDED TERM OF IMPRISONMENT.
- 6. TRIAL AND SENTENCE — CAPITAL MURDER.
- 7. ENHANCED PENALTIES FOR CERTAIN OFFENSES.
- 8. SENTENCING ALTERNATIVE — COMMUNITY SERVICE WORK.
- 9. SENTENCING ALTERNATIVE — PRE-ADJUDICATION PROBATION.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 5-4-102. Presentence investigation.
- 5-4-104. Authorized sentences generally.
- 5-4-106. Extended post-conviction no contact order.
- 5-4-107. Extended supervision and monitoring for certain sex offenders.

SECTION.

- 5-4-108. Sentencing for person who committed an offense when he or she was less than 18 years of age.
- 5-4-109. Sentencing for sex offense.

Effective Dates. Acts 2017, No. 539, § 14: Mar. 20, 2017. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that in light of recent United States Supreme Court decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, more than one hundred persons in Arkansas are entitled to relief under those decisions; and that this act is immediately necessary in order to make those persons eligible for parole in order to be in compliance with *Montgomery v. Louisiana*. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled ‘Funding and classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-4-102. Presentence investigation.

(a) If punishment is fixed by the court, the court may order a presentence investigation before imposing sentence.

(b)(1) The presentence investigation should be conducted by a presentence officer or another person designated by the court and should include an analysis of:

(A) The circumstances surrounding the commission of the offense;

(B) The defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits; and

(C) Any other matter that the investigator deems relevant or the court directs to be included.

(2) In a case involving a violation of § 5-11-106 in which a minor was unlawfully detained, restrained, taken, enticed, or kept, the presentence investigation shall include ascertaining the expenses incurred by a law enforcement agency, the Department of Human Services, and the lawful custodian in searching for and returning the minor to the lawful custodian.

(c)(1) Before imposing sentence, the court may order the defendant to submit to psychiatric examination and evaluation for a period not to exceed thirty (30) days.

(2) The defendant may be remanded for psychiatric examination and evaluation to the Arkansas State Hospital, or the court may appoint a qualified psychiatrist to make the psychiatric examination and evaluation.

(d)(1) Before imposing sentence, the court shall advise the defendant or his or her counsel of the factual contents and conclusions of any presentence investigation or psychiatric examination and evaluation and afford fair opportunity, if the defendant so requests, to controvert the factual contents and conclusions.

(2) A source of confidential information does not need to be disclosed.

(e) If the defendant is sentenced to imprisonment, a copy of the report of any presentence investigation or psychiatric examination or evaluation shall be transmitted immediately to the Division of Correction or, when the defendant is committed to the custody of a specific institution, to that specific institution.

History. Acts 1975, No. 280, § 804; A.S.A. 1947, § 41-804; Acts 1987, No. 487, § 2; 2019, No. 910, § 647.

Amendments. The 2019 amendment substituted "Division of Correction" for "Department of Correction" in (e).

5-4-103. Sentencing — Role of jury and court.

CASE NOTES

ANALYSIS

Sentence Fixed by Jury.

Waiver of Sentence by Jury.

Sentence Fixed by Jury.

Defendant's appeal of convictions for residential burglary and theft of property was frivolous because, *inter alia*, defendant was not entitled to have the trial court fix sentence, since a jury convicted defendant of a felony and the prosecutor did not consent to sentencing by the court. *Guthrie v. State*, 2017 Ark. App. 681 (2017).

Waiver of Sentence by Jury.

Defendant executed a written waiver of his right to a jury trial, which was signed by defendant, his attorney, the prosecutor, and the judge, and the circuit court made

a verbatim record of defendant's personal waiver of his right to jury trial in open court; because defendant was waiving his right to be tried by a jury on the charges, he was also waiving his right to be sentenced by a jury on the charges. *Johns v. State*, 2014 Ark. App. 560, 444 S.W.3d 873 (2014).

Waiver form provided that defendant was facing sentences for up to 15 years, which range clearly showed the enhanced sentencing range, as ordinarily the range was not to exceed six years for a Class D felony, plus the circuit court directly referenced the enhanced punishment ranges and asked defendant if he understood the same; the waiver ensured that defendant understood that, if found guilty, he was to be sentenced by the circuit court, and his waiver was valid. *Johns v. State*, 2014 Ark. App. 560, 444 S.W.3d 873 (2014).

5-4-104. Authorized sentences generally.

(a) No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter.

(b) A defendant convicted of capital murder, § 5-10-101, or treason, § 5-51-201, shall be sentenced to death or life imprisonment without parole in accordance with §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608, except if the defendant was younger than eighteen (18) years of age at the time he or she committed the capital murder or treason he or she shall be sentenced to life imprisonment with the possibility of parole after serving a minimum of thirty (30) years' imprisonment.

(c)(1) A defendant convicted of a Class Y felony or murder in the second degree, § 5-10-103, shall be sentenced to a term of imprisonment in accordance with §§ 5-4-401 — 5-4-404.

(2) In addition to imposing a term of imprisonment, the trial court may sentence a defendant convicted of a Class Y felony or murder in the second degree, § 5-10-103, to any one (1) or more of the following:

(A) Pay a fine as authorized by §§ 5-4-201 and 5-4-202;

(B) Make restitution as authorized by § 5-4-205; or

(C) Suspend imposition of an additional term of imprisonment, as authorized by subdivision (e)(3) of this section.

(d) A defendant convicted of an offense other than a Class Y felony, capital murder, § 5-10-101, treason, § 5-51-201, or murder in the second degree, § 5-10-103, may be sentenced to any one (1) or more of the following, except as precluded by subsection (e) of this section:

(1) Imprisonment as authorized by §§ 5-4-401 — 5-4-404;

(2) Probation as authorized by §§ 5-4-301 — 5-4-307 and 16-93-306 — 16-93-314;

(3) Payment of a fine as authorized by §§ 5-4-201 and 5-4-202;

(4) Restitution as authorized by a provision of § 5-4-205; or

(5) Imprisonment and payment of a fine.

(e)(1)(A) The court shall not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for the following offenses:

(i) Capital murder, § 5-10-101;

(ii) Treason, § 5-51-201;

(iii) A Class Y felony, except to the extent suspension of an additional term of imprisonment is permitted in subsection (c) of this section;

(iv) Driving or boating while intoxicated, § 5-65-103;

(v) Murder in the second degree, § 5-10-103, except to the extent suspension of an additional term of imprisonment is permitted in subsection (c) of this section; or

(vi) Engaging in a continuing criminal enterprise, § 5-64-405.

(B)(i) In any other case, the court may suspend imposition of sentence or place the defendant on probation, in accordance with §§ 5-4-301 — 5-4-307 and 16-93-306 — 16-93-314, except as otherwise specifically prohibited by statute.

(ii) The court may not suspend execution of sentence.

(2) If the offense is punishable by fine and imprisonment, the court may sentence the defendant to pay a fine and suspend imposition of the sentence as to imprisonment or place the defendant on probation.

(3)(A) The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment.

(B) However, the court shall not sentence a defendant to imprisonment and place him or her on probation, except as authorized by § 5-4-304.

(f)(1) If the court determines that an offender under eighteen (18) years of age would be more amenable to a rehabilitation program of the Division of Youth Services and that he or she previously has not been committed to the Division of Youth Services on more than one (1) occasion, the court may sentence the offender under eighteen (18) years of age to the Division of Correction for a term of years, suspend the sentence, and commit him or her to the custody of the Division of Youth Services.

(2) In a case under subdivision (f)(1) of this section, if the offender under eighteen (18) years of age completes the program of the Division of Youth Services satisfactorily, the Division of Youth Services shall return him or her to the sentencing court and provide the sentencing court with a written report of his or her progress and a recommendation that the offender under eighteen (18) years of age be placed on probation.

(3)(A) In the event that the offender under eighteen (18) years of age violates a rule of the Division of Youth Services' program or facility or

is otherwise not amenable to the Division of Youth Services' rehabilitative effort, the Division of Youth Services may return him or her to the sentencing court with a written report of his or her conduct and a recommendation that the offender under eighteen (18) years of age be transferred to the Division of Correction.

(B) If the court finds that the offender under eighteen (18) years of age has violated a rule of the Division of Youth Services' program or facility or is otherwise not amenable to the Division of Youth Services' rehabilitative effort, the court shall then revoke the suspension of the sentence originally imposed and commit the offender under eighteen (18) years of age to the Division of Correction.

(g) This chapter does not deprive the court of any authority conferred by law to:

- (1) Order a forfeiture of property;
- (2) Suspend or cancel a license;
- (3) Dissolve a corporation;
- (4) Remove a person from office;
- (5) Cite for contempt;
- (6) Impose any civil penalty; or
- (7) Assess costs as set forth in subsection (h) of this section.

(h) A defendant convicted of violating § 5-11-106, in which a minor was unlawfully detained, restrained, taken, enticed, or kept, may be assessed and ordered to pay expenses incurred by a law enforcement agency, the Department of Human Services, or the lawful custodian in searching for or returning the minor to the lawful custodian.

History. Acts 1975, No. 280, § 803; 1981, No. 620, § 7; 1983, No. 409, § 1; A.S.A. 1947, § 41-803; Acts 1987, No. 487, § 1; 1991, No. 608, §§ 1, 2; 1993, No. 192, § 1; 1993, No. 532, §§ 5, 9; 1993, No. 533, §§ 2, 3; 1993, No. 550, §§ 5, 9; 1993, No. 553, §§ 2, 3; 2001, No. 559, § 8; 2009, No. 748, § 3; 2011, No. 570, §§ 3, 4; 2011, No. 1120, §§ 1, 2; 2013, No. 1490, § 2; 2015, No. 299, § 1; 2017, No. 539, § 3; 2019, No. 910, § 648.

A.C.R.C. Notes. Acts 2017, No. 539, § 1, provided: "Title. This act shall be known and may be cited as the 'Fair Sentencing of Minors Act of 2017'."

Acts 2017, No. 539, § 2, provided: "Legislative intent.

"(a)(1) The General Assembly acknowledges and recognizes that minors are constitutionally different from adults and that these differences must be taken into account when minors are sentenced for adult crimes.

"(2) As the United States Supreme Court quoted in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), 'only a relatively small proportion of adolescents' who engage in

illegal activity 'develop entrenched patterns of problem behavior,' and 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control'.

"(3) Minors are more vulnerable to negative influences and outside pressures, including from their family and peers, and they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

"(4) The United States Supreme Court has emphasized through its cases in *Miller*, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), that 'the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes'.

"(5) Youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development oc-

curs, these individuals can become contributing members of society.

“(b) In the wake of these United States Supreme Court decisions and the emerging juvenile brain and behavioral development science, several states, including Texas, Utah, South Dakota, Wyoming, Nevada, Iowa, Kansas, Kentucky, Montana, Alaska, West Virginia, Colorado, Hawaii, Delaware, Connecticut, Vermont, Massachusetts, and the District of Columbia, have eliminated the sentence of life without parole for minors.

“(c) It is the intent of the General Assembly to eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing

standards in compliance with the United States Constitution for minors who commit serious crimes.”

Amendments. The 2015 amendment inserted “or boating” following “Driving” in (e)(1)(A)(iv).

The 2017 amendment deleted former (b)(1) and the former (b)(2) designation; and, in (b), inserted “or treason” and substituted “thirty (30)” for “twenty-eight (28)”.

The 2019 amendment substituted “Division of Correction” for “Department of Correction” and “Division of Youth Services” for the Department of Human Services” for “division” and similar language throughout (f).

CASE NOTES

ANALYSIS

Construction.

Applicability.

Illegal Sentence.

Writ of Habeas Corpus Denied.

Construction.

Two fifteen-year sentences imposed by the jury under the firearm enhancement were not illegal, because § 16-90-120 and this section could be read in a harmonious manner, and without statutory amendments, the appellate courts’ interpretations of the statutes remained the law. *Smith v. State*, 2013 Ark. 364 (2013).

Applicability.

Legislature did not intend for the penalty provisions of the Fair Sentencing of Minors Act of 2017 (FSMA), codified at § 5-4-104(b) and § 5-10-101(c), to apply retroactively where the FSMA contained no general retroactivity provision, no retroactivity provision was attached to the FSMA’s penalty provisions, and the legislature had expressly stated its intent that other sections of the FSMA applied retroactively. Therefore, the revised punishment for juveniles convicted of capital murder applies only to crimes committed on or after March 20, 2017, the effective date of the FSMA. *Harris v. State*, 2018 Ark. 179 (2018).

Parole-eligibility provision of the Fair Sentencing of Minors Act of 2017 (FSMA), codified at § 16-93-621(a)(2), did not apply at the time of defendant’s hearing

because the provision, by its plain language, applies only to those juvenile offenders who are serving a sentence for either capital or first-degree murder; because defendant’s life-without-parole sentence was vacated in 2016 under *Jackson v. Norris*, 2013 Ark. 175, and *Kelly v. Gordon*, 2015 Ark. 277, he was no longer serving a sentence to which parole eligibility could attach. *Harris v. State*, 2018 Ark. 179 (2018).

Because the relevant provisions of the Fair Sentencing of Minors Act of 2017 were inapplicable to defendant, defendant was entitled to a hearing under *Jackson v. Norris*, 2013 Ark. 175, to present *Miller* evidence for consideration and sentencing within the discretionary range for a Class Y felony. *Harris v. State*, 2018 Ark. 179 (2018).

In accord with *Harris v. State*, 2018 Ark. 179, 547 S.W.3d 64. *Robinson v. State*, 2018 Ark. 353, 563 S.W.3d 530 (2018).

In accord with *Harris v. State*, 2018 Ark. 179. The circuit court erred in applying the Fair Sentencing of Minors Act of 2017 (FSMA) to defendant juvenile’s case because defendant committed his crime before the effective date of the FSMA, and thus, the penalty provisions did not apply; because defendant’s sentence was vacated, he was no longer serving a sentence to which parole eligibility could attach, and thus, the parole-eligibility provision of the FSMA did not apply at the time of his hearing on the State’s motion for resentencing. *Ray v. State*, 2019 Ark. 46, 567 S.W.3d 63 (2019).

In accord with *Harris v. State*, 2018 Ark. 179; *Howell v. State*, 2019 Ark. 59, 567 S.W.3d 842 (2019); *Miller v. State*, 2019 Ark. 81, 570 S.W.3d 448 (2019); *Elliott v. State*, 2019 Ark. 162 (2019).

Illegal Sentence.

While this section and § 5-4-301 did not prohibit the suspended imposition of sentence for the offense of sexual assault in the second degree, the trial court could not have entered a judgment imposing a sentence for 180 months' imprisonment and also suspending imposition of an additional 180 months' imprisonment because the judgment had the effect of placing defendant under the jurisdiction of the court for 360 months when the maximum sentence authorized by statute was 240 months. *Ward v. State*, 2016 Ark. 8, 479 S.W.3d 9 (2016).

Writ of Habeas Corpus Denied.

Habeas relief was not warranted because an applicant was charged under a former first-degree murder statute where a murder was committed in the course of a robbery, and he was properly sentenced to life imprisonment without parole on his plea of guilty to capital-felony murder. An argument that murder in the first degree and capital murder were separate offenses with a separate penalty was rejected. *Gooch v. Hobbs*, 2014 Ark. 73 (2014) (Decided under former §§ 41-4702, 41-4706).

Cited: *Neal v. State*, 2016 Ark. 287, 497 S.W.3d 666 (2016); *Liggins v. State*, 2016 Ark. 432, 505 S.W.3d 191 (2016); *Burnell v. State*, 2016 Ark. App. 10 (2016); *Hunter v. State*, 2017 Ark. App. 256, 522 S.W.3d 793 (2017).

5-4-106. Extended post-conviction no contact order.

(a) As used in this section:

(1) "Extended post-conviction no contact order" means an order issued by a court to a defendant after a conviction for an offense listed in subsection (b) of this section that contains terms as described in subsection (d) of this section; and

(2) "Victim" means:

(A) A person against whom an offense listed in subsection (b) of this section was committed; or

(B) A family member of a person against whom capital murder, § 5-10-101, murder in the first degree, § 5-10-102, or murder in the second degree, § 5-10-103, was committed.

(b) At the request of the prosecuting attorney, a court shall determine whether to issue an extended post-conviction no contact order to a person convicted of one (1) or more of the following offenses:

(1) Capital murder, § 5-10-101, or attempted capital murder;

(2) Murder in the first degree, § 5-10-102, or attempted murder in the first degree;

(3) Murder in the second degree, § 5-10-103, or attempted murder in the second degree;

(4) Kidnapping, § 5-11-102;

(5) Battery in the first degree, § 5-13-201;

(6) Battery in the second degree, § 5-13-202;

(7) Rape, § 5-14-103;

(8) Sexual assault in the first degree, § 5-14-124;

(9) Domestic battering in the first degree, § 5-26-303;

(10) Domestic battering in the second degree, § 5-26-304; or

(11) Aggravated assault upon a law enforcement officer or an employee of a correctional facility, § 5-13-211, if a Class Y felony.

(c)(1) If a request is made under subsection (b) of this section, the court shall order the defendant to show cause why an extended post-conviction no contact order shall not be issued and shall hold a show cause hearing at the sentencing of the defendant.

(2) A victim has the right to be heard at the show cause hearing.

(d) If the court determines after the show cause hearing under subsection (c) of this section that the defendant should be subject to an extended post-conviction no contact order, the court shall:

(1) Enter written findings of fact and the grounds on which the extended post-conviction no contact order is issued;

(2) Determine the time period the extended post-conviction no contact order is effective, up to the life of the defendant, and include the time period in the extended post-conviction no contact order;

(3) Determine the terms described in subsection (e) of this section to be included in the extended post-conviction no contact order and include the terms in the extended post-conviction no contact order;

(4) Issue the extended post-conviction no contact order in a separate document from the judgment imposing the sentence on the defendant; and

(5) Provide a copy of the extended post-conviction no contact order to the defendant.

(e) The court may include one (1) or more of the following terms in the extended post-conviction no contact order:

(1) Order the defendant not to threaten, visit, assault, molest, or otherwise interfere with the victim;

(2) Order the defendant not to follow the victim, including at the victim's workplace;

(3) Order the defendant not to harass the victim;

(4) Order the defendant not to abuse or injure the victim;

(5) Order the defendant not to contact the victim by telephone, written communication, or electronic means; or

(6) Order the defendant to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified place at times when the victim is present.

(f)(1) An extended post-conviction no contact order entered under this section shall be enforced by a law enforcement agency without further order by the court.

(2) A law enforcement officer shall arrest and take a person into custody, with or without a warrant or other process, if the law enforcement officer has probable cause to believe that the person knowingly violated an extended post-conviction no contact order.

(g) Upon petition by either the prosecuting attorney or the person subject to the extended post-conviction no contact order, an extended post-conviction no contact order may be modified or terminated by the court if circumstances change that substantially alter:

(1) A term or condition of the extended post-conviction no contact order; or

(2) The reason for the issuance of the extended post-conviction no contact order.

(h) A person who knowingly violates an extended post-conviction no contact order upon conviction is guilty of a Class A misdemeanor.

History. Acts 2013, No. 1103, § 1; **Amendments.** The 2017 amendment 2017, No. 367, § 1. added (b)(11).

5-4-107. Extended supervision and monitoring for certain sex offenders.

(a)(1) The Division of Correction within one hundred twenty (120) days before the release on parole of a person who is required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., shall notify in writing the prosecuting attorney in the judicial district in which the person was sentenced of the person's impending release on parole.

(2) The Division of Community Correction within one hundred twenty (120) days before the release from probation of a person who is required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., shall notify in writing the prosecuting attorney in the judicial district in which the person was sentenced of the person's impending release from probation.

(3) The Arkansas State Hospital within thirty (30) days before the release from inpatient treatment of a person who was acquitted of a sex offense by reason of mental disease or defect or who is required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., shall notify in writing the prosecuting attorney in the judicial district in which the person was committed of the person's impending release from inpatient treatment.

(b)(1) The prosecuting attorney may file a petition in the circuit court requesting that the person to be released from incarceration, probation, or inpatient treatment be subject to an extended period of supervision and monitoring and alleging that the extended period of supervision and monitoring is necessary because the person poses a serious risk to the public and that there is a likelihood that the person would commit additional criminal offenses.

(2) A copy of the petition and any supporting documents shall be served by the prosecuting attorney on the person in accordance with the Arkansas Rules of Civil Procedure.

(3) If a hearing is requested, it shall be held at the earliest practicable time and at a time and on a date that would accommodate the transport of the person from a Division of Correction facility, Division of Community Correction facility, or the Arkansas State Hospital to the appropriate circuit court.

(c)(1)(A) A person subject to a petition for extended supervision and monitoring filed under this section shall be represented by an attorney if the person requests to be represented by an attorney.

(B) If the person requests an attorney, the circuit court shall conduct a hearing to consider the appointment of an attorney to represent the person.

(2)(A) The person subject to a petition for extended supervision and monitoring filed under this section shall be present at the hearing on the petition.

(B)(i) At the hearing the circuit court shall inform the person of the existence of possible relief under the Arkansas Rules of Criminal Procedure or as provided by law and shall determine whether the person desires the appointment of an attorney to represent him or her in proceedings under this section.

(ii) If the person waives the appointment of an attorney, the waiver shall be made in open court on the record.

(iii) If the circuit court determines that the person is indigent and that he or she either accepts the appointment of an attorney or is unable to make a competent decision whether to accept or reject an attorney, the circuit court shall issue written findings to that effect and enter a written order appointing an attorney to represent the person in proceedings under this section.

(iv) If the circuit court determines that the person waives the appointment of an attorney and understands the legal consequences of his or her decision, or that the person is not indigent, the circuit court shall issue written findings to that effect and enter a written order declining to appoint an attorney to represent the person in proceedings under this section.

(v) In determining whether the person is indigent, the circuit court shall consider the cost of post-conviction proceedings for persons subject to extended supervision and monitoring under this section.

(d)(1) If the circuit court finds by a preponderance of the evidence that the person about to be released from incarceration, probation, or inpatient treatment poses a serious risk to the public and that there is a likelihood that the person would commit additional criminal offenses, the court may order that the person be subject to an extended period of supervision and monitoring for a period of up to fifteen (15) years.

(2)(A) A court order of extended supervision and monitoring under this subsection may be renewed at any time prior to the expiration of the order on the circuit court's own order but only after another hearing and subsequent findings.

(B) A person subject to extended supervision and monitoring under this section is entitled to notice of and to attend the hearing on the renewal, as well as being entitled to contest the renewal of the order of extended supervision and monitoring.

(e)(1) A person who is subject to extended supervision and monitoring under this section may file a petition to be relieved of the order of extended supervision and monitoring after five (5) years have elapsed since the date of the original order.

(2) The prosecuting attorney is entitled to notice of a petition filed under this subsection and to a hearing on the petition.

(3) The circuit court shall rescind the order for extended supervision and monitoring if the person proves by clear and convincing evidence that he or she no longer poses a serious risk to the public and there is

no longer a likelihood that the person would commit additional criminal offenses.

(4) If a petition filed under this subsection is denied, the person may not file another petition under this subsection until five (5) years have elapsed since the date of the order of denial.

(f) An appeal of the grant or denial of a petition filed under this section may be taken by either party as provided by Supreme Court rule, and the appellate court shall review the case using an abuse of discretion standard.

(g) An order for extended supervision and monitoring under this section may include the requirement that the person wear an ankle monitor or other electronic device designed to track the person's movements at all times.

(h) The Division of Community Correction shall administer any extended supervision and monitoring under this section and may adopt rules to implement this section.

History. Acts 2015, No. 973, § 1; 2019, No. 910, §§ 649-651.

Amendments. The 2019 amendment substituted "Division of Correction" for

"Department of Correction" and "Division of Community Correction" for "Department of Community Correction" throughout (a), (b), and (h).

5-4-108. Sentencing for person who committed an offense when he or she was less than 18 years of age.

A defendant shall not be sentenced to death or life imprisonment without the possibility of parole for an offense if the defendant was less than eighteen (18) years of age at the time the offense was committed.

History. Acts 2017, No. 539, § 4.

A.C.R.C. Notes. Acts 2017, No. 539, § 1; provided: "Title. This act shall be known and may be cited as the 'Fair Sentencing of Minors Act of 2017'."

Acts 2017, No. 539, § 2, provided: "Legislative intent.

"(a)(1) The General Assembly acknowledges and recognizes that minors are constitutionally different from adults and that these differences must be taken into account when minors are sentenced for adult crimes.

"(2) As the United States Supreme Court quoted in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control'.

"(3) Minors are more vulnerable to negative influences and outside pressures, including from their family and peers, and they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

"(4) The United States Supreme Court has emphasized through its cases in *Miller*, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), that 'the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes'.

"(5) Youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society.

"(b) In the wake of these United States Supreme Court decisions and the emerging juvenile brain and behavioral develop-

ment science, several states, including Texas, Utah, South Dakota, Wyoming, Nevada, Iowa, Kansas, Kentucky, Montana, Alaska, West Virginia, Colorado, Hawaii, Delaware, Connecticut, Vermont, Massachusetts, and the District of Columbia, have eliminated the sentence of life without parole for minors.

“(c) It is the intent of the General Assembly to eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing standards in compliance with the United States Constitution for minors who commit serious crimes.”

5-4-109. Sentencing for sex offense.

A person who is convicted of an offense for which he or she is required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., shall be notified at his or her sentencing by the court that he or she is prohibited from recording a person under fourteen (14) years of age under § 5-14-137 if he or she is assessed as a Level 3 or Level 4 offender.

History. Acts 2019, No. 621, § 1.

SUBCHAPTER 2 — FINES, COSTS, AND RESTITUTION

SECTION.

5-4-205. Restitution.

5-4-206. Collection of unpaid restitution
— Interception of state income tax returns.

5-4-201. Fines — Limitations on amount.

CASE NOTES

Sentence Appropriate.

Prosecutor was entitled to defend herself and defendant could not show prejudice from the prosecutor's rebuttal, given that for aggravated robbery, he could have received up to a 40-year prison term, yet he received the minimum sentence of 10

years, and for his theft conviction, he could have received up to a six-year prison term or a fine up to \$10,000 or both, and he received no prison time and was ordered only to pay a \$250 fine. *Delatorre v. State*, 2015 Ark. App. 498, 471 S.W.3d 223 (2015).

5-4-205. Restitution.

(a)(1) A defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.

(2) If the court decides not to order restitution or orders restitution of only a portion of the loss suffered by the victim, the court shall state on the record in detail the reasons for not ordering restitution or for ordering restitution of only a portion of the loss.

(b)(1) Whether a trial court or a jury, the sentencing authority shall make a determination of actual economic loss caused to a victim by the offense.

(2) When an offense has resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant:

(A) Pay the cost of a necessary medical or related professional service or device relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing;

(B) Pay the cost of necessary physical and occupational therapy and rehabilitation;

(C)(i) Reimburse the victim for income lost by the victim as a result of the offense.

(ii) The maximum that a victim may recover for lost income is fifty thousand dollars (\$50,000); and

(D) Pay an amount equal to the cost of a necessary funeral and related services in the case of an offense that resulted in bodily injury that also resulted in the death of a victim.

(3) When an offense has not resulted in bodily injury to a victim, a restitution order entered under this section may require that the defendant reimburse the victim for income lost by the victim as a result of the offense.

(4)(A) The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial.

(B) The amount of loss may be decided by agreement between a defendant and the victim represented by the prosecuting attorney.

(5) If any item listed in subdivision (b)(2) of this section has been paid by the Crime Victims Reparations Board and the court orders restitution, the restitution order shall provide that the board is to be reimbursed by the defendant.

(c)(1) As used in this section and in any provision of law relating to restitution, "victim" means any person, partnership, corporation, or governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.

(2) "Victim" includes a victim's estate if the victim is deceased and a victim's next of kin if the victim is deceased as a result of the offense.

(d) A record of a defendant shall not be sealed under the Comprehensive Criminal Record Sealing Act of 2013, § 16-90-1401 et seq., until all court-ordered restitution has been paid.

(e)(1) Restitution shall be made immediately unless prior to the imposition of sentence the court determines that the defendant should be:

(A) Given a specified time to pay; or

(B)(i) Allowed to pay in specified installments.

(ii) If a court authorizes payment of restitution by a defendant in specified installments, a monthly installment fee of five dollars (\$5.00) shall be assessed on the defendant for making restitution payments on an installment basis in addition to the restitution and other assessments authorized.

(iii) The monthly installment fee under subdivision (e)(1)(B)(ii) of this section shall be remitted to the collecting official to be used to defray the cost of restitution collection.

(iv) [Repealed.]

(2) In determining the method of payment, the court shall take into account:

(A) The financial resources of the defendant and the burden that payment of restitution will impose with regard to another obligation of the defendant;

(B) The ability of the defendant to pay restitution on an installment basis or on another condition to be fixed by the court; and

(C) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.

(f)(1) If the defendant is placed on probation or any form of conditional release, any restitution ordered under this section is a condition of the suspended imposition of sentence, probation, parole, or transfer.

(2) The court may revoke probation and any agency establishing a condition of release may revoke the conditional release if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order.

(3) In determining whether to revoke probation or conditional release, the court or releasing authority shall consider:

(A) The defendant's employment status;

(B) The defendant's earning ability;

(C) The defendant's financial resources;

(D) The willfulness of the defendant's failure to pay; and

(E) Any other special circumstances that may have a bearing on the defendant's ability to pay.

(g)(1) The court shall enter a judgment against the defendant for the amount determined under subdivision (b)(4) of this section.

(2) The judgment may be enforced by the state or a beneficiary of the judgment in the same manner as a judgment for money in a civil action.

(3) A judgment under this section may be discharged by a settlement between the defendant and the beneficiary of the judgment.

(4) The court shall determine priority among multiple beneficiaries on the basis of:

(A) The seriousness of the harm each beneficiary suffered;

(B) The other resources of the beneficiaries; and

(C) Other equitable factors.

(5) If more than one (1) defendant is convicted of the crime for which there is a judgment under this section, the defendants are jointly and severally liable for the judgment unless the court determines otherwise.

(6)(A) A judgment shall require payment to the Division of Community Correction.

(B) The division shall provide for supervision and disbursement of funds under subdivision (g)(6)(A) of this section by the division's authorized economic sanction officers.

(h)(1) A judgment under this section does not bar a remedy available in a civil action under other law.

(2) A payment under this section shall be credited against a money judgment obtained by the beneficiary of the payment in a civil action.

(3) A determination under this section and the fact that payment was or was not ordered or made:

(A) Are not admissible in evidence in a civil action; and

(B) Do not affect the merits of a civil action.

History. Acts 1993, No. 533, § 4; 1993, No. 553, § 4; 2001, No. 1059, § 1; 2003, No. 1336, § 1; 2009, No. 633, § 2; 2009, No. 770, § 1; 2013, No. 1460, § 1; 2015, No. 583, § 1.

Amendments. The 2015 amendment repealed (e)(1)(B)(iv).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

CASE NOTES

ANALYSIS

Restitution Not Authorized.

Revocation Improper.

Revocation Proper.

Waiver.

Restitution Not Authorized.

Trial court erred in ordering defendant to pay restitution in connection with the alleged commission of theft of scrap metal because defendant was found not guilty of that offense by the trial court. *Bogard v. State*, 2014 Ark. App. 700, 450 S.W.3d 690 (2014).

Circuit court erred in ordering restitution based on a forged check following revocation of defendant's probation because restitution was not statutorily authorized for offenses with which defendant had not been charged or to which defendant did not plead guilty or no contest, and the State conceded error. *Phillips v. State*, 2017 Ark. App. 320 (2017).

Revocation Improper.

Circuit court erred in revoking defendant's suspended imposition of sentence (SIS); although the Office of Child Support Enforcement (OCSE) did not have authority over the conditions of defendant's SIS, he attempted to comply with his SIS and his reliance on "the State" was excusable where the OCSE records showed that he called the office, updated his information,

inquired about his case, and was told he had a zero balance and the case was closed even after he asked that the records be checked again. *Frahm v. State*, 2016 Ark. App. 85, 483 S.W.3d 317 (2016).

Revocation Proper.

Trial court did not err in considering the statutory factors for failure to pay restitution when it revoked defendant's probation because, while he was not ordered to pay restitution, defendant was admittedly capable of working and the trial court did not believe that he had made a sufficient effort to make the payments required by his probation. *McGuire v. State*, 2014 Ark. App. 52 (2014).

Circuit court did not clearly err in finding that defendant willfully violated the condition of her probation requiring her to make payments of court costs, a fine, and restitution and in revoking her probation because the circuit court found that she had paid \$1,483.60 toward her fines and restitution, but that the remainder of the agreed-upon payments of \$5,236.72 was outstanding; the amount of restitution and fines defendant agreed to pay were clearly explained in the judgment-and-disposition order she had signed; defendant's testimony that she had been ill or injured and unable to work was unsubstantiated; and the circuit court did not believe that she was making a sufficient effort to make payments. *Bohannon v.*

State, 2014 Ark. App. 434, 439 S.W.3d 735 (2014).

Record contained sufficient evidence to support the decision that defendant inexcusably failed to comply with a condition of suspension, namely the payment of restitution, as there was sufficient evidence as to his ability to pay, his current earnings, and his employment, and the circuit court made a determination of credibility regarding his explanation for nonpayment; the decision to revoke his suspended sentence was affirmed. *Hutchinson v. State*, 2014 Ark. App. 680, 449 S.W.3d 332 (2014).

Trial court properly suspended defendant's imposition of sentence for willfully failing to comply with its terms and conditions because restitution was a condition of the suspended imposition of sentence and defendant's failure to pay restitution was "willful" where the State introduced, without objection, evidence of defendant's nonpayment of his restitution, it was only after defendant was arrested on the revocation warrant that he attempted to make payments towards his court-ordered restitution, and, although he had the complete ability to pay, he did

not do so. *Robertson v. State*, 2015 Ark. App. 113 (2015).

Defendant's probation was properly revoked because the State introduced testimony that defendant had not paid fines, fees, and costs as directed; once the State established a record of nonpayment, defendant had the burden of demonstrating an inability to pay or some reasonable excuse for his failure to pay; defendant acknowledged that he had been employed at times during the term of his probation; and the circuit court, as the trier of fact, was entitled to assess defendant's explanation for his failure to pay and conclude that his nonpayment was not excusable. *Straub v. State*, 2019 Ark. App. 302, 577 S.W.3d 776 (2019).

Waiver.

Although defendants may have initially objected to a restitution order and the State's introduction of the restitution-assessment form, they subsequently waived their objections when they agreed to pay the restitution, despite the trial court specifically stating that it would hold a restitution hearing if needed. *Crews v. State*, 2015 Ark. App. 633 (2015).

Cited: *McDonald v. State*, 2015 Ark. App. 510 (2015).

5-4-206. Collection of unpaid restitution — Interception of state income tax returns.

(a) As used in this section, "restitution order" means a judgment and commitment order, judgment and disposition order, or other order that imposes a duty on a defendant to pay restitution.

(b) A court that orders the payment of restitution as a condition of a defendant's sentence shall note on the restitution order that the restitution may be collected through an interception of the defendant's state income tax return if the defendant has failed to comply with the terms and conditions of the restitution order.

(c) If a victim who is to receive restitution under a restitution order informs the prosecuting attorney that he or she has not been paid the ordered restitution in accordance with the restitution order, the prosecuting attorney may file a petition under this section to request the interception of the defendant's state income tax return in order to satisfy the restitution order.

(d)(1) A petition filed under this section shall be filed under the same case number as the original criminal offense.

(2) A defendant subject to the restitution order shall be served a copy of the petition and given notice of the hearing under the applicable rules of procedure.

(e)(1) The court shall order the interception of the defendant's state income tax return in an amount sufficient to satisfy the restitution order if it finds that:

(A) The defendant has knowingly failed to abide by the terms and conditions of the restitution order; and

(B) There exist no mitigating factors that would justify the non-payment of restitution.

(2) An order under this subsection shall remain in force until the restitution amount in the court's order has been satisfied through interception of the defendant's state income tax return or by other means.

(f)(1) After obtaining an order under subsection (e) of this section, the prosecuting attorney or other county official or entity with a duty to collect restitution may proceed under § 26-36-301 et seq. to collect the owed restitution from the defendant's state income tax return.

(2) The Department of Finance and Administration shall promulgate rules to implement subdivision (f)(1) of this section.

History. Acts 2015, No. 837, § 1.

SUBCHAPTER 3 — SUSPENSION OR PROBATION

SECTION.

- 5-4-301. Crimes for which suspension or probation prohibited — Criteria for suspension or probation in other cases.
- 5-4-303. Conditions of suspension or probation.
- 5-4-304. Confinement as condition of suspension or probation.
- 5-4-307. Time period — Calculation.
- 5-4-312. Presentence investigation — Placement in a community correction program.

SECTION.

- 5-4-320. Certain convicted felons to observe operations of correctional facility.
- 5-4-322. District court or city court — Probation — Fees and fines authorized.
- 5-4-323. Additional conditions — High school diploma or high school equivalency diploma — Employment training.

Effective Dates. Acts 2019, No. 871, § 24: July 1, 2019. Emergency clause provided: "It is found and determined by the General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a one (1) year period; that the effectiveness of this Act on July 1, 2019 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the legislative session, the delay in the effective date of this Act beyond July 1, 2019 could work irreparable harm upon the proper administration and provision of essential governmental programs.

Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 2019".

Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncoded

sections of this act preceding the emergency clause titled 'Funding and classification of cabinet-level department secretaries' and 'Transformation and Efficiencies Act transition team' should become effective at the beginning of the fiscal year to allow for implementation of

the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019".

5-4-301. Crimes for which suspension or probation prohibited — Criteria for suspension or probation in other cases.

(a)(1) A court shall not suspend imposition of sentence as to a term of imprisonment or place a defendant on probation for the following offenses:

(A) Capital murder, § 5-10-101;

(B) Treason, § 5-51-201;

(C) A Class Y felony, except to the extent suspension of an additional term of imprisonment is permitted in § 5-4-104(c);

(D) Driving or boating while intoxicated, § 5-65-103;

(E) Murder in the second degree, § 5-10-103, except to the extent suspension of an additional term of imprisonment is permitted in § 5-4-104(c); or

(F) Engaging in a continuing criminal enterprise, § 5-64-405.

(2) If it is determined pursuant to § 5-4-502 that a defendant has previously been convicted of two (2) or more felonies, the court shall not:

(A) Suspend imposition of sentence; or

(B) Place the defendant on probation.

(b) In making a determination as to suspension or probation, the court shall consider whether:

(1) There is undue risk that during the period of a suspension or probation the defendant will commit another offense;

(2) The defendant is in need of correctional treatment that can be provided most effectively by his or her commitment to an institution;

(3) Suspension or probation will discount the seriousness of the defendant's offense; or

(4) The defendant has the means available or is so gainfully employed that restitution or compensation to the victim of the defendant's offense will not cause an unreasonable financial hardship and will be beneficial to the rehabilitation of the defendant.

(c) While not controlling the discretion of the court, the following grounds shall be accorded weight in favor of suspension or probation:

(1) The defendant's conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his or her conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There was a substantial ground tending to excuse or justify the defendant's conduct, though failing to establish a defense;

- (5) The victim of the offense induced or facilitated its commission;
 - (6) The defendant has compensated or will compensate the victim of the offense for the damage or injury that the victim sustained;
 - (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;
 - (8) The defendant's conduct was the result of circumstances unlikely to recur;
 - (9) The character and attitude of the defendant indicate that he or she is unlikely to commit another offense;
 - (10) The defendant is particularly likely to respond affirmatively to suspension or probation;
 - (11) The imprisonment of the defendant would entail excessive hardship to the defendant or to a dependent of the defendant;
 - (12) The defendant is elderly or in poor health; or
 - (13) The defendant cooperated with law enforcement authorities in his or her own prosecution or in bringing another offender to justice.
- (d)(1) When the court suspends the imposition of sentence on a defendant or places him or her on probation, the court shall enter a judgment of conviction only if the court sentences the defendant to:
- (A) Pay a fine and suspends imposition of sentence as to imprisonment or places the defendant on probation; or
 - (B) A term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment.
- (2) The entry of a judgment of conviction does not preclude:
- (A) The modification of the original order suspending the imposition of sentence on a defendant or placing a defendant on probation following a revocation hearing held pursuant to § 16-93-307; and
 - (B) A modification set within the limits of §§ 16-93-309 and 16-93-312.

History. Acts 1975, No. 280, § 1201; 1977, No. 474, §§ 2, 8; 1977, No. 482, § 2; A.S.A. 1947, § 41-1201; Acts 1991, No. 608, § 3; 1993, No. 192, § 2; 1999, No. 1569, § 1; 2009, No. 748, § 4; 2011, No. 570, § 6; 2015, No. 299, § 2.

Amendments. The 2015 amendment inserted "or boating" following "Driving" in (a)(1)(D).

CASE NOTES

ANALYSIS

Convictions.
 Illegal Sentence.
 Suspension of Sentence.

Convictions.

Circuit court had the authority to impose a sentence of probation because no evidence was presented and no determination was made that defendant was a habitual offender who had been convicted

of two or more felonies. Because the sentence of probation was not an illegal sentence, it followed that the revocation of probation was also not illegal. *Whitson v. State*, 2014 Ark. App. 283 (2014).

Illegal Sentence.

While § 5-4-104 and this section did not prohibit the suspended imposition of sentence for the offense of sexual assault in the second degree, the trial court could not have entered a judgment imposing a sen-

tence for 180 months' imprisonment and also suspending imposition of an additional 180 months' imprisonment because the judgment had the effect of placing defendant under the jurisdiction of the court for 360 months when the maximum sentence authorized by statute was 240 months. *Ward v. State*, 2016 Ark. 8, 479 S.W.3d 9 (2016).

Appellant's original sentence was not illegal where the term of imprisonment was more than the statutory minimum, and thus, the trial court did not lack authority to impose an additional suspended sentence. *Todd v. State*, 2016 Ark. App. 270, 493 S.W.3d 350 (2016).

Suspension of Sentence.

Subdivision (a)(2)(A) of this section does not prohibit the suspension of any portion of defendant's habitual sentence where case law interpreted a similarly worded former statutory provision to find that the trial court was free to suspend an additional term in the habitual range as long as only a portion was suspended beyond the statutory minimum term, and the General Assembly had not rejected that interpretation. *Todd v. State*, 2016 Ark. App. 204, 489 S.W.3d 207 (2016).

Pursuant to subdivision (d)(2) of this section and former § 5-4-309 (see now § 16-93-308), the circuit court was authorized at revocation to modify the original order and impose any sentence that origi-

nally could have been given. *Todd v. State*, 2016 Ark. App. 204, 489 S.W.3d 207 (2016).

This section did not preclude an order of suspended imposition of sentence (SIS) where at the time appellant was placed on SIS, it had not been determined that he had previously been convicted of two or more felonies; he was not charged, convicted, or sentenced as an habitual offender. *Robertson v. State*, 2016 Ark. App. 379, 499 S.W.3d 247 (2016).

Because appellant was not determined to be a habitual offender when his plea was accepted and he was placed on suspended imposition of sentence (SIS), he could not be sentenced as a habitual offender on revocation of that SIS. Appellant's 20-year sentence on revocation did not exceed the nonhabitual range for Class B felonies, but the sentencing order erroneously reflected that he was sentenced as a habitual offender and the case was remanded in part for entry of a corrected sentencing order. *Robertson v. State*, 2016 Ark. App. 379, 499 S.W.3d 247 (2016).

Revocation of defendant's suspended imposition of sentence (SIS) was upheld; based on precedent, the SIS was not an illegal sentence even though defendant was an habitual offender because the circuit court also imposed a term of imprisonment. *Anderson v. State*, 2018 Ark. App. 389, 557 S.W.3d 283 (2018).

5-4-303. Conditions of suspension or probation.

(a) If a court suspends imposition of sentence on a defendant or places him or her on probation, the court shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life.

(b) The court shall provide as an express condition of every suspension or probation that the defendant not commit an offense punishable by imprisonment during the period of suspension or probation.

(c) If the court suspends imposition of sentence on a defendant or places him or her on probation, as a condition of its order the court may require that the defendant:

(1) Support his or her dependents and meet his or her family responsibilities;

(2) Undergo available medical or psychiatric treatment and enter and remain in a specified institution when required for medical or psychiatric treatment;

(3) Participate in a community-based rehabilitative program or work-release program that uses practices proven to reduce recidivism

and for which the court may impose a reasonable fee or assessment on the defendant to be used in support of the community-based rehabilitative program or work-release program;

(4) Refrain from frequenting an unlawful or designated place or consorting with a designated person;

(5) Have no firearm in his or her possession;

(6) Make restitution to an aggrieved party in an amount the defendant can afford to pay for the actual loss or damage caused by his or her offense;

(7) Post a bond, with or without surety, conditioned on the performance of a prescribed condition; and

(8) Satisfy any other condition reasonably related to the rehabilitation of the defendant and not unduly restrictive of his or her liberty or incompatible with his or her freedom of conscience.

(d) If the court places a defendant on probation, as a condition of its order the court may require that the defendant:

(1) Report as directed to the court or the probation officer and permit the probation officer to visit the defendant at the defendant's place of employment or elsewhere;

(2) Remain within the jurisdiction of the court unless granted permission to leave in a written statement by the court or the probation officer; and

(3) Answer any reasonable inquiry by the court or the probation officer and promptly notify the court or probation officer of any change in address or employment.

(e) If the court suspends imposition of sentence on a defendant or places him or her on probation, the court shall:

(1) Require that the defendant either:

(A) Work consistently in suitable employment for the entire duration of his or her suspended sentence or probation or for three (3) years, whichever occurs earlier; or

(B)(i) If the defendant is unemployed, pursue a prescribed secular course of study and show continuous progress in improving academic skills and education by increasing his or her reading, math, and communication skills to at least the ninth grade level regardless of a prior high school or other educational credentials.

(ii) Under subdivision (e)(1)(B)(i) of this section, a defendant shall also meet at least one (1) of the following benchmarks:

(a) Earn a Career Readiness Certificate;

(b) Earn a Workforce Alliance for Growth in the Economy certificate;

(c) Earn a high school diploma by passing the Adult Education Section-approved assessment; or

(d) Enroll in vocational training designed to equip him or her for suitable employment.

(iii) If the defendant is serving a suspended sentence or is on probation at the end of the study or training required by subdivision (e)(1)(B)(i) of this section, he or she shall work in suitable employ-

ment for the remainder of his or her suspended sentence or probation or for three (3) years, whichever occurs earlier; and

(2) Give the defendant a written statement explicitly setting forth the conditions under which he or she is being released.

(f)(1) If the court suspends imposition of sentence on a defendant or places him or her on probation conditioned upon his or her making restitution under subdivision (c)(6) of this section, the court, by concurrence of the victim, defendant, and the prosecuting authority, shall determine the amount to be paid as restitution.

(2) After considering the assets, financial condition, and occupation of the defendant, the court shall further determine:

(A) Whether restitution shall be total or partial;

(B) The amounts to be paid if by periodic payments; and

(C) If a personal service is contemplated, the reasonable value and rate of compensation for the personal service rendered to the victim.

(g)(1) In a case in which counsel has been appointed to represent a defendant due to the defendant's indigency and the court suspends imposition of sentence or places a defendant on probation at the time of disposition, the court shall revisit the issue of the defendant's indigency.

(2)(A) When appropriate and when the defendant is financially able to do so, the court may assess an attorney's fee to be paid by the defendant as part of his or her suspension or probation.

(B) The amount of the assessed attorney's fee shall be commensurate with the defendant's ability to pay.

(C) The assessed attorney's fee shall be paid to the state as a means of partial reimbursement for providing appointed counsel.

(3) In no event is failure to pay an assessed attorney's fee, standing alone, a ground for the revocation of a suspension or probation.

(4)(A) The assessed attorney's fee under subdivision (g)(2) of this section shall be collected by the county or city official, agency, or department designated under § 16-13-709 as primarily responsible for the collection of fines assessed in a circuit court or district court of this state.

(B) On or before the tenth day of each month, the county or city official, agency, or department described in subdivision (g)(4)(A) of this section shall remit any assessed attorney's fee collected to the Arkansas Public Defender Commission on a form provided by the commission.

(C) The commission shall deposit the money collected into a separate account within the State Central Services Fund to be known as "Public Defender Attorney Fees" to be used solely to defray costs for the commission.

(h) In addition to other available sanctions, a person sentenced prior to August 1, 2017, who is on probation under this section has the option to be sanctioned administratively under § 16-93-306(d) as it existed at the time of his or her sentence or as § 16-93-306 exists as of August 1, 2017.

(i)(1) Unless specified otherwise in subsection (g) of this section and § 16-87-213, the moneys collected by the courts under subsection (g) of

this section and § 16-87-213 shall be deposited into the State Treasury to the credit of the State Central Services Fund.

(2) If Arkansas law requires that the fees levied under subsection (g) of this section be deposited into the State Administration of Justice Fund, the Treasurer of State shall transfer the amount of the fees collected each month under subsection (g) of this section from the State Administration of Justice Fund to the State Central Services Fund.

History. Acts 1975, No. 280, § 1203; 1977, No. 474, §§ 3, 9; 1977, No. 482, § 3; 1985, No. 315, § 1; A.S.A. 1947, § 41-1203; Acts 1989, No. 305, § 1; 1993, No. 119, § 1; 1997, No. 281, § 1; 1999, No. 231, § 1; 1999, No. 1564, § 6; 1999, No. 1569, § 2; 2003, No. 1765, § 1; 2011, No. 570, § 7; 2015, No. 1198, § 1; 2017, No. 423, § 1; 2019, No. 871, § 17; 2019, No. 910, § 131.

Amendments. The 2015 amendment deleted former (c)(2) and (c)(3), and redesignated the remaining subdivisions ac-

cordingly; inserted “in a written statement” in (d)(2); substituted “court shall” for “defendant shall” in the introductory language of (e); inserted (e)(1); inserted designation (e)(2); and substituted “Give the defendant” for “be given” in (e)(2).

The 2017 amendment added (h).

The 2019 amendment by No. 871 added (i).

The 2019 amendment by No. 910 substituted “Adult Education Section” for “Department of Career Education” in (e)(1)(B)(ii)(c).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

Validity, Construction, and Application

of State Sex Offender Statutes Prohibiting Use of Computers and Internet as Conditions of Probation or Sentence. 89 A.L.R.6th 261.

CASE NOTES

ANALYSIS

Appeal.
No Cause for Revocation.
Statement of Conditions.
Written Notice.

Appeal.

Contrary to defendant’s allegation, the terms and conditions of defendant’s suspended imposition of sentence were a part of the trial court’s sentencing order and were also included in the clerk’s record. The appellate court could not say that the trial court clearly erred in revoking defendant’s suspended sentence. *Valencia v. State*, 2016 Ark. App. 176 (2016).

No Cause for Revocation.

Revocation of defendant’s probation, based upon defendant absconding, was inappropriate because there was nothing in the conditions requiring defendant to report or to notify the probation depart-

ment of a change of address. Accordingly, the circuit court based its revocation of defendant’s probation on a violation that was not a written condition of defendant’s probation. *Tomes v. State*, 2019 Ark. App. 267, 577 S.W.3d 21 (2019).

Statement of Conditions.

There is no requirement under this section that the defendant sign a written acknowledgment when he receives the written statement of conditions or that one be introduced at a revocation hearing. Even without considering certain testimony, the trial court found that defendant received a copy of the conditions of his probation based on testimony about routine practices; moreover, defendant indicated by his testimony that he was aware of the conditions of his probation when he disputed the violations and partially complied with the conditions. *Johnson v. State*, 2014 Ark. App. 606, 447 S.W.3d 143 (2014).

Written Notice.

Circuit court erred in revoking defendant's suspended sentence for failure to complete a community-service obligation because, while the conditions imposed upon her contained a duty to comply with all special conditions imposed by the court, no special conditions were noted in the order, and a subsequent contempt order did not clearly inform her that a new obligation or condition was added to her suspended sentence or that a failure to comply with that new condition could result in revocation. *Blankenship v. State*, 2014 Ark. App. 104 (2014).

Evidence was sufficient to show that

defendant received the conditions of suspension that were expressly communicated in writing where he had signed the conditions document, acknowledged having received all of the other paperwork associated with his plea, and he neither contended that he was unaware of the conditions of his suspended sentence nor refuted a deputy's testimony about the sheriff's office's standard practices of giving copies of paperwork to anyone placed on probation or suspension. *Geeslin v. State*, 2017 Ark. App. 571, 533 S.W.3d 132 (2017).

Cited: *Myers v. State*, 2014 Ark. App. 720, 451 S.W.3d 588 (2014).

5-4-304. Confinement as condition of suspension or probation.

(a) If a court suspends the imposition of sentence on a defendant or places him or her on probation, the court may require as an additional condition of its order that the defendant serve a period of confinement in the county jail, city jail, or other authorized local detention, correctional, or rehabilitative facility at any time or consecutive or nonconsecutive intervals within the period of suspension or probation as the court shall direct.

(b) An order that the defendant serve a period of confinement as a condition of suspension or probation is not deemed a sentence to a term of imprisonment, and a court does not need to enter a judgment of conviction before imposing a period of confinement as a condition of suspension or probation.

(c)(1)(A) The period actually spent in confinement pursuant to this section in a county jail, city jail, or other authorized local detention, correctional, or rehabilitative facility shall not exceed:

- (i) One hundred twenty (120) days in the case of a felony; or
- (ii) Thirty (30) days in the case of a misdemeanor.

(B) In the case of confinement to a facility in the Division of Community Correction, the period actually spent in confinement under this section shall not exceed three hundred sixty-five (365) days.

(2) For purposes of this subsection, any part of a twenty-four-hour period spent in confinement constitutes a day of confinement.

History. Acts 1975, No. 280, § 1204; A.S.A. 1947, § 41-1204; Acts 1993, No. 532, § 6; 1993, No. 550, § 6; 1999, No. 1569, § 3; 2003, No. 1742, § 1; 2005, No. 1443, § 1; 2011, No. 570, § 8; 2019, No. 910, § 652.

Amendments. The 2019 amendment substituted "Division of Community Correction" for "Department of Community Correction" in (c)(1)(B).

CASE NOTES

Illegal Sentence.

In a probation revocation case, defendant's original sentence on a Class A misdemeanor was remanded for correction, because (1) the sentence was illegal on its face, as defendant was sentenced to both 20 days in jail and 12 months' probation and, contrary to subsection (a) of this

section, the original sentencing order did not show that the 20 days' confinement was a condition of defendant's probation; and (2) the trial court failed to give defendant credit for the 20 days he was ordered to serve in the original order. *Thompson v. State*, 2017 Ark. App. 158, 516 S.W.3d 297 (2017).

5-4-305. Effect on appeal.

CASE NOTES

Appeal Properly Dismissed.

Circuit court properly dismissed defendant's appeal to the circuit court from the district court's order of probation under the First Offender Act, § 16-93-301 et seq.; this section did not grant defendant

the right to appeal as there had been no adjudication of guilt and defendant never alleged any error in the entry of the order of probation. *Barner v. State*, 2015 Ark. 247, 464 S.W.3d 450 (2015).

5-4-307. Time period — Calculation.

(a) Except as provided in subsection (c) of this section, a period of suspension or probation commences to run when the circuit court pronounces the probationer's sentence in the courtroom or upon the entry of a sentencing order, whichever occurs first.

(b)(1) Whether pronounced or entered at the same or a different time, multiple periods of suspension or probation run concurrently.

(2) The period of a suspension or probation also runs concurrently with any federal or state term of imprisonment or parole to which a defendant is or becomes subject to during the period of the suspension or probation.

(c) If a court sentences a defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment, the period of the suspension commences to run on the day the defendant is lawfully set at liberty from the imprisonment.

History. Acts 1975, No. 280, § 1206; A.S.A. 1947, § 41-1206; Acts 2019, No. 248, § 1.

Amendments. The 2019 amendment substituted "when the circuit court pronounces the probationer's sentence in the

courtroom or upon the entry of a sentencing order, whichever occurs first" for "on the day it is imposed" in (a); and substituted "pronounced or entered" for "imposed" in (b)(1).

RESEARCH REFERENCES

Ark. L. Rev. Mark James Chaney, Recent Developments: Arkansas Supreme Court Denies Judges' Discretion to Suspend Enhanced Criminal Sentences Imposed by Statute and Holds All Suspen-

sions of Enhanced Sentences Allowed Under Law Must Run Concurrently with the Primary Sentence, 66 Ark. L. Rev. 907 (2013).

CASE NOTES

ANALYSIS

In General.

Commencement of Sentence.

Suspended Sentences.

Suspension.

In General.

Defendant's sentences were not illegal where the applicable order did not state that the sentences were to run consecutively, and thus, under § 5-4-403 and this section, the sentences ran concurrently. *McElroy v. State*, 2018 Ark. App. 342, 553 S.W.3d 182 (2018).

Commencement of Sentence.

In a probation revocation case, defendant's argument that the imposition of more time than her original sentence was improper was rejected because, even though the period of probation began to run when defendant was sentenced, the trial court could have imposed any sentence upon revocation that could have been imposed originally under former § 5-4-309(g)(1)(A). Defendant pled guilty to 2 Class C felonies and was subject to a maximum sentence of 10 years on both counts; therefore, sentences of 72 months and 50 months upon revocation were permitted. *Whitson v. State*, 2014 Ark. App. 283 (2014).

Suspended Sentences.

On probation revocation, it was error to order suspended sentences consecutive to a prison sentence because subdivision (b)(2) of this section, dealing specifically with suspended sentencing, did not allow suspended sentences consecutive to a prison sentence for another charge. *Walden v. State*, 2014 Ark. 193, 433 S.W.3d 864 (2014).

On probation revocation, it was error to order consecutive suspended sentences because subdivision (b)(1) of this section barred such sentences. *Walden v. State*, 2014 Ark. 193, 433 S.W.3d 864 (2014).

Although the appellate court upheld the revocation of defendant's suspended sentence, it modified the sentencing order to reflect that the two sentences were to run concurrently. *Valencia v. State*, 2016 Ark. App. 176 (2016).

Trial court did not err in sentencing appellant to imprisonment upon revoca-

tion of his suspended sentence where the State's evidence showed that he had been released from prison and was thereafter accused and convicted of forgery. *Todd v. State*, 2016 Ark. App. 270, 493 S.W.3d 350 (2016).

Trial court erred in requiring defendant to complete drug and/or alcohol treatment while incarcerated because her suspended imposition of sentence (SIS) could not begin until she was released from prison, and no condition of SIS could be imposed prior to that date. *Holmes-Childers v. State*, 2016 Ark. App. 464, 504 S.W.3d 645 (2016).

Trial court erred in revoking defendant's suspended imposition of sentence (SIS) and in sentencing her to six years' incarceration; defendant's original sentence was illegal because suspended sentences imposed with terms of imprisonment for different crimes must run concurrently, not consecutively, and the trial court failed to first correct the original sentencing order before revoking defendant's SIS, which left the original illegal sentence still in place. *Dodds v. State*, 2018 Ark. App. 86, 543 S.W.3d 513 (2018).

Defense counsel was not allowed to withdraw under Ark. Sup. Ct. & Ct. App. R. 4-3(k); although counsel adequately addressed the adverse rulings from the probation revocation hearing, counsel did not address any issue of sentencing in his no-merit brief and defendant's sentencing was arguably illegal as it imposed a suspended imposition of sentence consecutive to other terms of imprisonment, an issue that could be raised at any time, and should have been addressed by counsel. *Norton v. State*, 2018 Ark. App. 370, 553 S.W.3d 765 (2018).

Suspension.

In a case where a trial court revoked defendant's suspended impositions of sentence (SIS) for two felonies, the trial court did not err by imposing a sentence that included two consecutive suspended sentences; defendant had 6 years to do in prison from the consecutive running of his terms of imprisonment and, when he was released from imprisonment, he was on SIS for concurrent total of 5 years. An incorrect oral ruling did not control the

appellate court's decision. *Jones v. State*, 2014 Ark. App. 167 (2014).

Defendant's underlying suspended sentence was an illegal sentence because the trial court ran it consecutively to the two

six-year terms of imprisonment and the sentence was statutorily required to run concurrently with the prison sentences. *Reyes v. State*, 2015 Ark. App. 55, 454 S.W.3d 279 (2015).

5-4-312. Presentence investigation — Placement in a community correction program.

(a)(1) A court may require that either a presentence investigation be conducted by either the probation officer or presentence investigation officer assigned to the court or that the defense counsel of a defendant, the prosecuting attorney, a probation officer, and other persons whom the court believes have information relevant to the sentencing of the defendant submit to the court the information in writing prior to sentencing.

(2) The presentence investigation or information submitted by the persons described in subdivision (a)(1) of this section shall be forwarded with the commitment order to the circuit clerk and retained in the defendant's case file.

(b) Upon a preliminary determination by a court that a defendant is an eligible offender and that placement in a community correction program under § 16-93-1201 et seq. is proper, the court may:

(1)(A) Suspend the imposition of the sentence or place the defendant on probation, under § 5-4-104, § 5-4-201 et seq., §§ 5-4-301 — 5-4-307, and § 16-93-314.

(B) A sentence under subdivision (b)(1)(A) of this section may be accompanied by assignment to a community correction program under § 16-93-1201 et seq. for a designated period of time commensurate with the goals of the community correction program assignment and the rules established by the Board of Corrections for the operation of community correction programs.

(C) The court shall maintain jurisdiction over the defendant sentenced under subdivision (b)(1)(A) of this section with supervision outside the confines of the specific programming provided by probation officers assigned to the court.

(D)(i) If a person sentenced under subdivision (b)(1)(A) of this section violates any term or condition of his or her sentence or term of probation, revocation of the sentence or term of probation shall be consistent with the procedures established by law for the revocation of suspended imposition of sentence or probation.

(ii) Upon revocation as described in subdivision (b)(1)(D)(i) of this section, the court shall determine whether the defendant shall remain under the jurisdiction of the court and be assigned to a more restrictive community correction program, facility, or institution for a period of time or committed to the Division of Correction.

(iii) If the defendant is committed to the Division of Correction under subdivision (b)(1)(D)(ii) of this section, the court shall specify if the commitment is for judicial transfer of the defendant to the

Division of Community Correction or is a commitment to the Division of Correction;

(2)(A) Commit the defendant to the custody of the Division of Correction for judicial transfer to the Division of Community Correction subject to the following:

(i) That the sentence imposed provides that the defendant shall not serve more than three (3) years of confinement, with credit for meritorious good time, with initial placement in a Division of Community Correction facility; and

(ii) That the preliminary placement in the Division of Community Correction facility is conditioned upon the Division of Community Correction's final determination of the defendant's initial and continuing eligibility for Division of Community Correction placement and the defendant's compliance with all applicable rules established by the Board of Corrections for community correction programs.

(B) Post-prison supervision of the defendant shall accompany and follow the community correction program when appropriate; or

(3)(A) Sentence the defendant to the Division of Correction, granting the Division of Correction the ability to administratively transfer the defendant to the Division of Community Correction if the Division of Correction determines that the sentence imposed meets the eligibility requirements for placement in a community correction program under this subchapter and § 16-93-1201 et seq.

(B) Administrative transfer to the Division of Community Correction under subdivision (b)(3)(A) of this section is conditioned upon bed space availability and upon the Division of Community Correction's final determination of the defendant's initial and continuing eligibility for Division of Community Correction placement.

(C) A determination of ineligibility under subdivision (b)(3)(A) of this section by the Division of Community Correction shall result in the immediate return of the defendant to the Division of Correction.

(D) A decision to release a defendant administratively transferred to the Division of Community Correction from the Division of Correction under subdivision (b)(3)(A) of this section is vested solely with the Parole Board.

(c) A defendant may not be excluded from placement in a community correction program under this section based solely on the defendant's inability to speak, read, write, hear, or understand English.

(d)(1) If after receipt of an order directing a defendant to a community correction center, the Division of Community Correction determines that the defendant is not eligible for placement in a community correction program under § 16-93-1201 et seq., the Division of Community Correction shall not admit the defendant but shall immediately notify the prosecuting attorney in writing.

(2) After receipt of the notice required under subdivision (d)(1) of this section, the prosecuting attorney shall notify the court of the defendant's ineligibility for placement in a community correction center, and the court shall resentence the defendant accordingly.

History. Acts 2011, No. 570, § 14; 2015, No. 549, § 1; 2017, No. 423, § 2; 2019, No. 910, §§ 653-655.

Amendments. The 2015 amendment inserted (d)(1) and (2).

The 2017 amendment inserted “a preliminary” in the introductory language of (b); substituted “defendant” for “offender” following “transfer of the” in (b)(1)(D)(iii); substituted “three (3) years” for “two (2) years” in (b)(2)(A)(i); in (b)(2)(A)(ii), substituted “That the preliminary” for “That

the initial”, “upon the Department of Community Correction’s final determination of the defendant’s initial and continuing” for “upon the defendant’s continuing”, and “the Board of Corrections” for “the board”; added (b)(3)(A) through (b)(3)(D); and made stylistic changes.

The 2019 amendment substituted “Division of Correction” for “Department of Correction” and “Division of Community Correction” for “Department of Community Correction” throughout (b) and (d).

RESEARCH REFERENCES

Ark. L. Rev. Mason L. Boling, Legislative Note: That Was the Easy Part: The Development of Arkansas’s Public Safety

Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact, 66 Ark. L. Rev. 1109 (2013).

5-4-313. Placement in a drug treatment program — Drug court alternative.

RESEARCH REFERENCES

Ark. L. Rev. Mason L. Boling, Legislative Note: That Was the Easy Part: The Development of Arkansas’s Public Safety

Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact, 66 Ark. L. Rev. 1109 (2013).

5-4-320. Certain convicted felons to observe operations of correctional facility.

(a) Any person who pleads guilty or nolo contendere or is found guilty in any circuit court of this state of a felony and whose sentence of imprisonment is placed on suspension or who is placed on probation may be ordered by the circuit court to report to an appropriate Division of Correction facility on a date certain to be scheduled by the division for the duration of that work day to observe the operation of the division’s facility.

(b) The person convicted of the felony shall bear the cost of transportation to and from the division’s facility.

History. Acts 1985, No. 548, § 1; A.S.A. 1947, § 41-1212; Acts 2019, No. 910, § 656.

Amendments. The 2019 amendment,

in (a), substituted “Division of Correction” for “Department of Correction”, “division” for “department”, and “division’s” for “department’s”.

5-4-322. District court or city court — Probation — Fees and fines authorized.

(a)(1) A district court or city court may:

(A) Place a defendant on probation or sentence him or her to public service work; and

(B) As a condition of its order, require the defendant to pay a:

(i) Fine in one (1) or several sums; and

(ii) Probation fee or a public service work supervisory fee in an amount to be established by the district court or city court.

(2)(A) The broad objective of probation is to educate and rehabilitate a person placed on probation.

(B) A condition for probation shall bear a reasonable relationship to the offense committed or to future criminality and be reasonably necessary to assist the defendant in leading a law-abiding life.

(3)(A) A condition of probation shall be closely monitored and supervised by the district court or city court or by a probation officer.

(B) The district court or city court shall determine if a condition of probation is in compliance with the provisions of subdivision (a)(2) of this section.

(b)(1) This section regarding probation and probation fees does not apply when the defendant is charged with violating the Omnibus DWI or BWI Act, § 5-65-101 et seq., or the Underage DUI or BUI Law, § 5-65-301 et seq.

(2) When the defendant is charged with violating the Omnibus DWI or BWI Act, § 5-65-101 et seq., the district court may require the defendant to pay a public service work supervisory fee in an amount to be established by it if the district court orders public service in lieu of jail under § 5-65-111.

(3) When the defendant is charged with violating the Underage DUI or BUI Law, § 5-65-301 et seq., the district court may require the defendant to pay a public service work supervisory fee in an amount to be established by it for any public service work ordered by the district court.

(c) This section is supplemental to any other law allowing a district court or city court to attach a condition on an order of probation.

(d)(1) Except as provided in subsection (e) of this section, no district court or city court may impose a probation fee in any case in which the only sentence available is a monetary fine, court costs, or if applicable, restitution.

(2) In a case described in subdivision (d)(1) of this section, a defendant may be given time to make the payments, and the installment payment fee in § 16-13-704 is the only fee authorized for administering those accounts.

(3) If the sentence available includes imprisonment, probation and probation fees may be ordered in lieu of imprisonment.

(e) If a fine is an authorized sentence, the fine may be suspended and probation and a probation fee may be ordered in lieu of the fine.

(f)(1) A probation fee shall be collected in full for each month in which a defendant is on probation.

(2) The probation fee shall accrue for each month that a defendant does not make a payment and the defendant remains on probation as ordered by the district court or city court.

History. Acts 1991, No. 190, § 1; 1993, No. 777, § 1; 2001, No. 1809, § 4; 2003, No. 1765, § 2; 2005, No. 2239, § 1; 2015, No. 299, § 3.

Amendments. The 2015 amendment, in (b)(1), inserted “or BWI” preceding “Act” and “or BUI” following “DUI”; in

(b)(2), inserted “or BWI,” deleted “or city court” preceding “may require,” deleted “or city court” preceding “orders,” and substituted “under” for “pursuant to”; and, in (b)(3), inserted “or BUI,” deleted “or city court” preceding “may require,” and deleted “or city court” at the end.

5-4-323. Additional conditions — High school diploma or high school equivalency diploma — Employment training.

(a)(1) As an additional requirement for suspension of sentence or probation, a court may require any person who is sentenced for a felony or a Class A misdemeanor to make a good faith effort toward completion of a high school diploma or a high school equivalency diploma approved by the Adult Education Section unless the person has already achieved a high school diploma or a high school equivalency diploma.

(2) The additional requirement under subdivision (a)(1) of this section shall be implemented only:

(A) After the appropriate school or adult education program has received notice from the court at least ten (10) working days prior to the person’s making application to enroll so as to allow a school or adult education program official to review the person’s educational records; and

(B) Upon the acceptance of the person by the administrative head of the school or adult education program.

(3) If no appropriate school or adult education program can be found, the additional requirement under subdivision (a)(1) of this section is of no effect.

(4) In the alternative, the court may allow the defendant to pursue a prescribed course of study or vocational training approved by the court that is designed to equip him or her for suitable employment.

(5)(A) After consultation with the school or the adult education program, the court shall determine the appropriate documentation for a person participating under a provision of this section and shall report any documentation of school or adult education program participation on a quarterly basis to the Administrative Office of the Courts.

(B) The office shall then report to the Adult Education Section.

(b)(1) Unless the person is employed or has a skill that will facilitate immediate employment, the court may require any person sentenced for a felony or a Class A misdemeanor to make a good faith effort toward obtaining gainful employment by participating in an appropriate employment training program as an additional requirement for suspension of sentence or probation.

(2)(A) The additional requirement under subdivision (b)(1) of this section shall be implemented by the person’s reporting to the local workforce center for registration, intake, and employability skills assessment.

(B) If the person is on probation, the additional requirement under subdivision (b)(1) of this section shall be accomplished in conjunction with the probation officer.

(C) In addition to the employability skills assessment, the person shall register for employment with the local workforce center and upon obtaining employment shall communicate the event to the:

(i) Court if on suspension of sentence; or

(ii) Probation officer if on probation.

(c) As used in this section, “good faith effort” means a person:

(1) Has been enrolled in a program of instruction leading to a high school diploma or a high school equivalency diploma and is attending a school or an adult education course; or

(2) Is registered for employment and enrolled and participating in an employment-training program with the purpose of obtaining gainful employment.

(d) A person who fails to make a good faith effort to comply with a court order issued under this section upon conviction is guilty of a violation and shall be punished by a fine of at least one hundred dollars (\$100) but not more than one thousand dollars (\$1,000).

History. Acts 1991, No. 857, § 1; 1993, No. 343, § 1; 1993, No. 1267, § 1; 1994 (2nd Ex. Sess.), No. 30, § 4; 1994 (2nd Ex. Sess.), No. 31, § 4; 1999, No. 1323, § 2; 2003, No. 1006, § 1; 2007, No. 827, § 14; 2011, No. 570, §§ 15-17; 2015, No. 1115, § 1; 2019, No. 910, §§ 132, 133.

Amendments. The 2015 amendment substituted “high school equivalency diploma” for “general education develop-

ment certificate” throughout the section; and substituted “high school equivalency diploma approved by the Department of Career Education” for “general education development certificate” in (a)(1).

The 2019 amendment substituted “Adult Education Section” for “Department of Career Education” in (a)(1) and (a)(5)(B).

SUBCHAPTER 4 — IMPRISONMENT

SECTION.

5-4-402. Place of imprisonment.

5-4-404. Credit for time spent in custody.

Effective Dates. Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled ‘Funding and

classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-4-401. Sentence.

RESEARCH REFERENCES

ALR. Construction and Application of Rule Announced in *Miller v. Alabama* that Sentences of Life Without Parole for Persons Under 18 at Time of Committing

Homicide Offense Violate Eighth Amendment If Mandatory and Imposed Without Considering Youth-Related Factors. 16 A.L.R.7th Art. 4 (2015).

CASE NOTES

ANALYSIS

Applicable Range.
Evidence.
Illegal Sentences.
Juveniles.
Modification of Sentence.
Prejudice.
Propriety of Sentence.
Ranges.
Right to Jury Trial.
Suspension or Probation.
Writ of Habeas Corpus Denied.

Applicable Range.

Conditions of probation signed by defendant warned him that any violation could result in a sentence of up to 10 years' imprisonment, and because he was sentenced within the range allowed by the applicable statutes, the revocation and sentence were affirmed. *Leal v. State*, 2014 Ark. App. 673 (2014).

Defendant's sentence for manslaughter was illegal on its face, as the judgment reflected a sentence of zero years' imprisonment for the manslaughter conviction, a Class C felony, which required a three-year minimum; however, as the State did not file a notice of appeal or of cross-appeal, the legality of the manslaughter sentence could not be considered. *Blackwell v. State*, 2015 Ark. App. 96, 455 S.W.3d 848 (2015).

Evidence.

Because defendant was sentenced to the minimum sentence on the first count of commercial burglary and to probation on the remaining counts, he could not establish prejudice from the introduction of evidence during sentencing of his marijuana use. *Gillean v. State*, 2015 Ark. App. 698, 478 S.W.3d 255 (2015).

Illegal Sentences.

Sentences imposed upon revocation of defendant's suspended imposition of sen-

tences were illegal because there was no evidence in the record that defendant was convicted and sentenced as a habitual offender and the sentences imposed by the trial court exceeded the statutory range. *Reed v. State*, 2014 Ark. App. 10 (2014).

Juveniles.

When defendant sought a resentencing hearing under *Miller* after being sentenced to life imprisonment without the possibility of parole for a murder committed in 1986 when defendant was a juvenile, it was error to deny the request and resentence defendant to life imprisonment with the possibility of parole after 30 years based on the Fair Sentencing of Minors Act of 2017 (FSMA); the FSMA did not apply for the reasons stated in *Harris v. State*, 2018 Ark. 179, and *Robinson v. State*, 2018 Ark. 353. *Segerstrom v. State*, 2019 Ark. 36, 566 S.W.3d 466 (2019).

In accord with *Harris v. State*, 2018 Ark. 179. Circuit court erred in applying the Fair Sentencing of Minors Act of 2017 (FSMA) to defendant juvenile's case because defendant committed his crime before the effective date of the FSMA, and thus, the penalty provisions did not apply; defendant was entitled to a hearing to present evidence for consideration and sentencing within the discretionary range for a Class Y felony, which was 10 to 40 years or life. *Ray v. State*, 2019 Ark. 46, 567 S.W.3d 63 (2019).

Modification of Sentence.

Where defendant's conviction for aggravated residential burglary under § 5-39-204 was reversed because there was insufficient evidence that defendant attempted to inflict a serious physical injury and defendant did not dispute that residential burglary under § 5-39-201 was proven, his 40-year sentence was modified to the maximum allowed for residential bur-

glary, a Class B felony, which was 20 years' imprisonment. *Inskip v. State*, 2016 Ark. App. 135, 484 S.W.3d 709 (2016).

Prejudice.

Defendant received 17 years in prison for second-degree sexual assault, which was within the statutory range; because defendant could not establish a sentencing phase error as a matter of law, the appellate court was not required to address whether the circuit court erred in admitting certain evidence. *Holley v. State*, 2014 Ark. App. 557, 444 S.W.3d 884 (2014).

Propriety of Sentence.

Defendant's probation revocation sentence of 14 years in prison was proper because (1) Acts 1999, No. 1569 was in effect when the crimes were committed, so the trial court could impose any sentence originally available, (2) a maximum sentence of 20 years was originally available, and (3) defendant had served six years. *Walden v. State*, 2014 Ark. 193, 433 S.W.3d 864 (2014).

Defendant's four-year suspended imposition of sentence on probation revocation was proper because (1) Acts 1999, No. 1569 was in effect when the crimes were committed, so the trial court could impose any sentence originally available, (2) a maximum sentence of 10 years was originally available, and (3) defendant had served six years. *Walden v. State*, 2014 Ark. 193, 433 S.W.3d 864 (2014).

Prosecutor was entitled to defend herself and defendant could not show prejudice from the prosecutor's rebuttal, given that for aggravated robbery, he could have received up to a 40-year prison term, yet he received the minimum sentence of 10 years, and for his theft conviction, he could have received up to a six-year prison term or a fine up to \$10,000 or both, and he received no prison time and was ordered only to pay a \$250 fine. *Delatorre v. State*, 2015 Ark. App. 498, 471 S.W.3d 223 (2015).

Sentence of 119 months for failure to appear was not an abuse of discretion, it was clear from the trial court's ruling that the severity of the sentence that defendant received was due to the seriousness of the circumstances surrounding the offense and there was no indication that

defendant was being punished for offenses for which he was not convicted or that his sentence was a result of passion or prejudice. *Whittier v. State*, 2015 Ark. App. 536 (2015).

Imposing 20 days' incarceration on a wife who admittedly violated a divorce decree requiring her to notify the court before spending her daughter's funds was not an abuse of discretion where the wife admittedly and repeatedly violated a known court order over several years, and the court could have imposed up to 30 days' of incarceration under subdivision (b)(3) of this section. *Coleman v. Coleman*, 2016 Ark. App. 324, 497 S.W.3d 688 (2016).

Ranges.

Waiver form provided that defendant was facing sentences for up to 15 years, which range clearly showed the enhanced sentencing range, as ordinarily the range was not to exceed six years for a Class D felony, plus the circuit court directly referenced the enhanced punishment ranges and asked defendant if he understood the same; the waiver ensured that defendant understood that, if found guilty, he was to be sentenced by the circuit court, and his waiver was valid. *Johns v. State*, 2014 Ark. App. 560, 444 S.W.3d 873 (2014).

Under Arkansas law, possession of a firearm by a felon is at most a class B felony, punishable by no more than 20 years. Unless the flight causes serious physical injury to another, fleeing by vehicle is at most a class D felony, punishable by up to six years. *United States v. Thomas*, 790 F.3d 784 (8th Cir. 2015).

Defendant's sentence for second-degree assault against a family member was modified to 90 days, to be served concurrently with his 15-year sentence for the burglary, because the trial court erred in sentencing him to one year of imprisonment since the sentence could not exceed 90 days. *Davis v. State*, 2015 Ark. App. 234, 459 S.W.3d 821 (2015).

In a case involving drugs and weapons offenses, it was error to allow a video of law enforcement officers firing a weapon found in the search of the home to be played for the jury and admitted into evidence because it was not relevant to any of the specific offenses charged since the offenses did not require that the weapon be fireable; however, the error

was harmless because the evidence against defendant was overwhelming and defendant's sentences fell within the statutory sentence ranges. *Gutierrez v. State*, 2015 Ark. App. 516, 472 S.W.3d 147 (2015).

Right to Jury Trial.

Wife was not entitled to a jury trial after the circuit court found her in indirect criminal contempt because there was no dispute that the sentence imposed on the wife was less than six months and that the misdemeanor statute did not authorize a sentence in excess of six months, and there was nothing to indicate from the court's colloquy with the wife's counsel that the court contemplated imposing a sentence greater than six months. *Damron v. Damron*, 2019 Ark. App. 160, 574 S.W.3d 166 (2019).

Suspension or Probation.

Trial court erred in resentencing defendant because the five-year sentence with five years' suspended imposition of sen-

tence that the court imposed on revocation of defendant's probation exceeded the maximum allowable sentence available for defendant's conviction for tampering with physical evidence, a Class D felony. *Wilson v. State*, 2016 Ark. App. 342 (2016).

Writ of Habeas Corpus Denied.

Habeas relief was not warranted because an applicant was charged under a former first-degree murder statute where a murder was committed in the course of a robbery, and he was properly sentenced to life imprisonment without parole on his plea of guilty to capital-felony murder. An argument that murder in the first degree and capital murder were separate offenses with a separate penalty was rejected. *Gooch v. Hobbs*, 2014 Ark. 73 (2014) (Decided under former § 41-4701).

Cited: *Washington v. State*, 2014 Ark. App. 122 (2014); *Singleton v. State*, 2014 Ark. App. 165 (2014); *Whitson v. State*, 2014 Ark. App. 283 (2014); *Jones v. State*, 2015 Ark. App. 621 (2015).

5-4-402. Place of imprisonment.

(a) Except as provided in §§ 5-4-304 and 16-93-708, a defendant convicted of a felony and sentenced to imprisonment shall be committed to the custody of the Division of Correction for the term of his or her sentence or until released in accordance with law.

(b) Except as provided in § 16-93-708, a defendant convicted of a misdemeanor and sentenced to imprisonment shall be committed to the county jail or other authorized institution designated by the court for the term of his or her sentence or until released in accordance with law.

(c) Except as provided in § 5-4-304 or § 16-93-708, a defendant convicted of a felony violation of §§ 5-64-419 — 5-64-442 and sentenced to imprisonment shall be committed to the custody of the Division of Correction for the term of his or her sentence or until released in accordance with law.

(d)(1)(A) A juvenile sentenced in circuit court who is less than sixteen (16) years of age when sentenced shall be committed to the custody of the Division of Youth Services until his or her sixteenth birthday, at which time he or she shall be transferred to the Division of Correction, except as provided by court order or parole decision made by the Parole Board.

(B) Any record from the Division of Youth Services shall be transferred to the Division of Correction at the time the juvenile is transferred.

(2) A juvenile less than sixteen (16) years of age who is awaiting transfer to the Division of Correction shall be segregated from the

general delinquency population housed at the Division of Youth Services.

(e)(1) With the consent and approval of the Division of Youth Services, the Division of Correction may transfer from the Division of Correction to the Division of Youth Services any inmate less than eighteen (18) years of age who, in the opinion of the Division of Correction and the Division of Youth Services, is more suited and adaptable by age, physical size, and temperament to a program of the Department of Human Services.

(2)(A) An inmate transferred to the Division of Youth Services shall be segregated from the general delinquency population housed at the Division of Youth Services.

(B) If an inmate violates a rule of the Division of Youth Services' program or facility or is otherwise not amenable to the Division of Youth Services' rehabilitative effort, the Division of Youth Services may return the inmate to the Division of Correction.

(3) Any inmate transferred to the Division of Youth Services under this subsection shall be returned to the Division of Correction on the inmate's eighteenth birthday.

History. Acts 1975, No. 280, § 902; 1985, No. 982, § 1; A.S.A. 1947, § 41-902; Acts 1999, No. 1192, § 11; 2001, No. 559, § 9; 2005, No. 680, § 2; 2011, No. 570, § 18; 2011, No. 1120, § 4; 2019, No. 910, § 657.

Amendments. The 2019 amendment substituted "Division of Correction" for "Department of Correction" and "Division of Youth Services of the Department of Human Services" for "division" and similar language throughout the section.

5-4-403. Multiple sentences — Concurrent and consecutive terms.

CASE NOTES

ANALYSIS

Concurrent Sentences.
Consecutive Sentences.

Concurrent Sentences.

Defendant's sentence for second-degree assault against a family member was modified to 90 days, to be served concurrently with his 15-year sentence for the burglary, because the trial court erred in sentencing him to one year of imprisonment since the sentence could not exceed 90 days. *Davis v. State*, 2015 Ark. App. 234, 459 S.W.3d 821 (2015).

Defendant's sentences were not illegal where the applicable order did not state that the sentences were to run consecutively, and thus, under this section and § 5-4-307, the sentences ran concurrently.

McElroy v. State, 2018 Ark. App. 342, 553 S.W.3d 182 (2018).

Consecutive Sentences.

Trial court did not abuse its discretion by ordering defendant's sentences for 20 counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child to run consecutively because there was no indication that the trial court failed to consider factors urged by the defense, each sentence was within the statutory range of punishment, and no exception applied. *Steele v. State*, 2014 Ark. App. 257, 434 S.W.3d 424 (2014).

Jury sentenced defendant to eight years and 20 years, respectively, for two second-degree murder convictions, to be served consecutively; the sentence was within the statutory sentencing range, even for a single count of second-degree murder, and

no abuse of discretion was shown. *Lewis v. State*, 2014 Ark. App. 730, 451 S.W.3d 591 (2014).

Trial court is permitted, based on subsection (a) of this section, to order that multiple sentences of imprisonment for multiple offenses be run consecutively, including those where suspension had been revoked. *Todd v. State*, 2016 Ark. App. 204, 489 S.W.3d 207 (2016).

Any argument that the circuit court abused its discretion in ordering defendant's sentences to be served consecutively would be wholly frivolous because defendant pleaded guilty to the crimes of

rape and attempted first-degree murder, and he requested the maximum sentence in open court. *Jones v. State*, 2017 Ark. 266 (2017).

Defendant's 10-year sentence for possession of a firearm by a felon was within the statutory range of punishment for a Class D felony committed by a defendant previously convicted of four or more felonies, and the circuit court's decision to run the sentence consecutively to defendant's other sentence was within the court's discretion. *McNeely v. State*, 2017 Ark. App. 483, 530 S.W.3d 876 (2017).

5-4-404. Credit for time spent in custody.

If a defendant is held in custody for conduct that results in a sentence to imprisonment or confinement as a condition of suspension or probation, the court, the Division of Correction, or the Division of Community Correction shall credit the time spent in custody against the sentence, including time spent in a local jail facility awaiting transfer to the Division of Correction or the Division of Community Correction.

History. Acts 1975, No. 280, § 904; A.S.A. 1947, § 41-904; Acts 2001, No. 1034, § 1; 2019, No. 910, § 658.

Amendments. The 2019 amendment substituted "Division of Correction" for

"Department of Correction" twice and "Division of Community Correction" for "Department of Community Correction" twice.

CASE NOTES

Entitlement to Credit.

Defendant was not entitled to jail-time credit for confinement under this section, because he served time in confinement as a condition of probation, not from being held in custody as a matter of pretrial incarceration. *Burgess v. State*, 2016 Ark. 175, 490 S.W.3d 645 (2016).

Defendant was not entitled to more jail time credit because he was essentially asking for his jail time to be counted twice when he asked that an additional 394 days of the same jail time credit be applied to his sentence for the initial charges; regardless of whether the jail time from defendant's initial arrest until his sentencing on the subsequent charges applied against his sentence, the time could not be

applied against both sentences. *Hanley v. State*, 2017 Ark. App. 583, 535 S.W.3d 276 (2017).

Trial court did not err in denying defendant's claim for additional jail-time credit against his murder conviction for the period of time after defendant's bond was revoked on the murder charge when he was arrested on possession charges. This section does not address how jail-time credits are to be allocated or attributed between multiple convictions, defendant was sentenced on multiple convictions, and defendant offered no persuasive authority that the trial court erred. *Bailey v. State*, 2019 Ark. App. 53, 571 S.W.3d 21 (2019).

SUBCHAPTER 5 — EXTENDED TERM OF IMPRISONMENT

SECTION.

5-4-501. Habitual offenders — Sentencing for felony.

Effective Dates. Acts 2015, No. 895, § 49: Apr. 1, 2015. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that prison overcrowding is one of the largest problems currently burdening the state both from a public safety and budgetary standpoint; that safe and effective measures are needed to immediately combat this problem; and that this act is immediately necessary because in the interests of public safety and the state budget the Department of Correction, Department of Community Correction, Department of Human Services, and the Parole Board should be allowed to immediately implement these new measures. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncoded sections of this act preceding the emergency clause titled ‘Funding and classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-4-501. Habitual offenders — Sentencing for felony.

(a)(1) A defendant meeting the following criteria may be sentenced to pay any fine authorized by law for the felony conviction and to an extended term of imprisonment as set forth in subdivision (a)(2) of this section:

(A) A defendant who:

(i) Is convicted of a felony other than those enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies or who has been found guilty of more than one (1) but fewer than four (4) felonies;

(B) A defendant who:

(i) Is convicted of any felony enumerated in subsection (c) of this section committed after August 31, 1997; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies not enumerated in subsection (c) of this

section or who has been found guilty of more than one (1) but fewer than four (4) felonies not enumerated in subsection (c) of this section; or

(C) A defendant who:

(i) Is convicted of any felony enumerated in subsection (d) of this section committed after August 31, 1997; and

(ii) Has previously been convicted of more than one (1) felony but fewer than four (4) felonies not enumerated in subsection (d) of this section or has been found guilty of more than one (1) but fewer than four (4) felonies not enumerated in subsection (d) of this section.

(2) The extended term of imprisonment for a defendant described in subdivision (a)(1) of this section is as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than ten (10) years nor more than sixty (60) years, or life;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than six (6) years nor more than fifty (50) years;

(C) For a conviction of a Class B felony, a term of imprisonment of not less than five (5) years nor more than thirty (30) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than three (3) years nor more than twenty (20) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not more than twelve (12) years;

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than five (5) years more than the maximum sentence for the unclassified felony; and

(G) For a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment not less than ten (10) years nor more than fifty (50) years, or life.

(b)(1) A defendant meeting the following criteria may be sentenced to pay any fine authorized by law for the felony conviction and to an extended term of imprisonment as set forth in subdivision (b)(2) of this section:

(A) A defendant who:

(i) Is convicted of a felony other than a felony enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and

(ii) Has previously been convicted of four (4) or more felonies or who has been found guilty of four (4) or more felonies;

(B) A defendant who:

(i) Is convicted of any felony enumerated in subsection (c) of this section committed after June 30, 1997; and

(ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (c) of this section or who has been found guilty of four (4) or more felonies not enumerated in subsection (c) of this section; or

(C) A defendant who:

(i) Is convicted of any felony enumerated in subsection (d) of this section committed after June 30, 1997; and

(ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (d) of this section or who has been found guilty of four (4) or more felonies not enumerated in subsection (d) of this section.

(2) The extended term of imprisonment for a defendant described in subdivision (b)(1) of this section is as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than ten (10) years nor more than life;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than six (6) years nor more than sixty (60) years;

(C) For a conviction of a Class B felony, a term of imprisonment of not less than five (5) years nor more than forty (40) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than three (3) years nor more than thirty (30) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not more than fifteen (15) years;

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than two (2) times the maximum sentence for the unclassified felony offense; and

(G) For a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment not less than ten (10) years nor more than fifty (50) years, or life.

(c)(1) Except as provided in subdivision (c)(3) of this section, a defendant who is convicted of a serious felony involving violence enumerated in subdivision (c)(2) of this section and who previously has been convicted of one (1) or more of the serious felonies involving violence enumerated in subdivision (c)(2) of this section may be sentenced to pay any fine authorized by law for the serious felony involving violence conviction and shall be sentenced:

(A) To imprisonment for a term of not less than forty (40) years nor more than eighty (80) years, or life; and

(B) Without eligibility for parole or community correction transfer except under § 16-93-615.

(2) As used in this subsection, “serious felony involving violence” means:

(A) Any of the following felonies:

(i) Murder in the first degree, § 5-10-102;

(ii) Murder in the second degree, § 5-10-103;

(iii) Kidnapping, § 5-11-102, involving an activity making it a Class Y felony;

(iv) Aggravated robbery, § 5-12-103;

(v) Terroristic act, § 5-13-310, involving an activity making it a Class Y felony;

(vi) Rape, § 5-14-103;

(vii) Sexual assault in the first degree, § 5-14-124;

(viii) Causing a catastrophe, § 5-38-202(a);

(ix) Aggravated residential burglary, § 5-39-204; or

(x) Aggravated assault upon a law enforcement officer or an employee of a correctional facility, § 5-13-211, if a Class Y felony; or

(B) A conviction of a comparable serious felony involving violence from another jurisdiction.

(3) A defendant who is convicted of rape, § 5-14-103, or sexual assault in the first degree, § 5-14-124, involving a victim less than fourteen (14) years of age and who has previously been convicted of one (1) or more of the serious felonies involving violence enumerated in subdivision (c)(2) of this section may be sentenced to pay any fine authorized by law for the rape or sexual assault in the first degree conviction and shall be sentenced to life in prison without the possibility of parole.

(4)(A) The following procedure governs a trial at which a sentence to an extended term of imprisonment is sought pursuant to this subsection:

(i) The jury shall first hear all evidence relevant to the serious felony involving violence with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(ii)(a) If the defendant is found guilty of the serious felony involving violence, out of the hearing of the jury the trial court shall hear evidence of whether the defendant has pleaded guilty or nolo contendere to or been found guilty of a prior serious felony involving violence and shall determine the number of prior serious felony involving violence convictions, if any.

(b) The defendant has the right to hear and controvert evidence described in subdivision (c)(4)(A)(ii)(a) of this section and to offer evidence in his or her support;

(iii)(a) The trial court shall then instruct the jury as to the number of prior convictions for a serious felony involving violence and the statutory sentencing range.

(b) The jury may be advised as to the nature of a prior serious felony involving violence conviction and the date and place of a prior serious felony involving violence conviction; and

(iv) The jury shall retire again and then determine a sentence within the statutory range.

(B) The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated serious felony involving violence under Arkansas criminal law lies within the discretion of the trial judge at the time of sentencing.

(d)(1) A defendant who is convicted of a felony involving violence enumerated in subdivision (d)(2) of this section and who previously has been convicted of two (2) or more of the felonies involving violence enumerated in subdivision (d)(2) of this section may be sentenced to pay any fine authorized by law for the felony involving violence conviction and shall be sentenced to an extended term of imprisonment without eligibility for parole or community correction transfer except under § 16-93-615 as follows:

(A) For a conviction of a Class Y felony, a term of imprisonment of not less than life in prison;

(B) For a conviction of a Class A felony, a term of imprisonment of not less than forty (40) years nor more than life in prison;

(C) For a conviction of a Class B felony or for a conviction of an unclassified felony punishable by life imprisonment, a term of imprisonment of not less than thirty (30) years nor more than sixty (60) years;

(D) For a conviction of a Class C felony, a term of imprisonment of not less than twenty-five (25) years nor more than forty (40) years;

(E) For a conviction of a Class D felony, a term of imprisonment of not less than twenty (20) years nor more than forty (40) years; and

(F) For a conviction of an unclassified felony punishable by less than life imprisonment, a term of imprisonment not more than three (3) times the maximum sentence for the unclassified felony offense.

(2) As used in this subsection, "felony involving violence" means:

(A) Any of the following felonies:

(i) Murder in the first degree, § 5-10-102;

(ii) Murder in the second degree, § 5-10-103;

(iii) Kidnapping, § 5-11-102;

(iv) Aggravated robbery, § 5-12-103;

(v) Rape, § 5-14-103;

(vi) Battery in the first degree, § 5-13-201;

(vii) Terroristic act, § 5-13-310;

(viii) Sexual assault in the first degree, § 5-14-124;

(ix) Sexual assault in the second degree, § 5-14-125;

(x) Domestic battering in the first degree, § 5-26-303;

(xi) Residential burglary, § 5-39-201(a);

(xii) Aggravated residential burglary, § 5-39-204;

(xiii) Unlawful discharge of a firearm from a vehicle, § 5-74-107;

(xiv) Criminal use of prohibited weapons, § 5-73-104, involving an activity making it a Class B felony;

(xv) A felony attempt, solicitation, or conspiracy to commit:

(a) Capital murder, § 5-10-101;

(b) Murder in the first degree, § 5-10-102;

(c) Murder in the second degree, § 5-10-103;

(d) Kidnapping, § 5-11-102;

(e) Aggravated robbery, § 5-12-103;

(f) Aggravated assault upon a law enforcement officer or an employee of a correctional facility, § 5-13-211, if a Class Y felony;

(g) Rape, § 5-14-103;

(h) Battery in the first degree, § 5-13-201;

(i) Domestic battering in the first degree, § 5-26-303;

(j) Residential burglary, § 5-39-201(a); or

(k) Aggravated residential burglary, § 5-39-204; or

(xvi) Aggravated assault upon a law enforcement officer or an employee of a correctional facility, § 5-13-211, if a Class Y felony; or

(B) A conviction of a comparable felony involving violence from another jurisdiction.

(3)(A) The following procedure governs a trial at which a sentence to an extended term of imprisonment is sought pursuant to this subsection:

(i) The jury shall first hear all evidence relevant to the felony involving violence with which the defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge;

(ii)(a) If the defendant is found guilty of the felony involving violence, out of the hearing of the jury the trial court shall hear evidence of whether the defendant has pleaded guilty or nolo contendere to or been found guilty of two (2) or more prior felonies involving violence and shall determine the number of prior felony involving violence convictions, if any.

(b) The defendant has the right to hear and controvert evidence described in subdivision (d)(3)(A)(ii)(a) of this section and to offer evidence in his or her support;

(iii)(a) The trial court shall then instruct the jury as to the number of prior felony involving violence convictions and the statutory sentencing range.

(b) The jury may be advised as to the nature of a prior felony involving violence conviction and the date and place of a prior felony involving violence conviction; and

(iv) The jury shall retire again and then determine a sentence within the statutory range.

(B) The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated felony involving violence under Arkansas criminal law lies within the discretion of the trial judge at the time of sentencing.

(e)(1) For the purpose of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary, § 5-39-201, and of the felony that was the object of the burglary are considered a single felony conviction or finding of guilt.

(2) A conviction or finding of guilt of an offense that was a felony under the law in effect prior to January 1, 1976, is considered a previous felony conviction or finding of guilt.

(f) For the purposes of determining whether a defendant has previously been convicted of a serious felony involving violence or a felony involving violence under subsections (c) and (d) of this section, the entry of a plea of guilty or nolo contendere or a finding of guilt by a court to a felony enumerated in subsections (c) and (d) of this section, respectively, as a result of which a court places the defendant on a suspended imposition of sentence, a suspended sentence, or probation, or sentences the defendant to the Division of Correction, is considered a previous felony conviction.

(g) Any defendant deemed eligible to be sentenced under a provision of both subsections (c) and (d) of this section shall be sentenced only under subsection (d) of this section.

(h) If the provisions of subsection (c) or subsection (d) of this section, or both, are held invalid by a court, the defendant's case shall be

remanded to the trial court for resentencing of the defendant under the provisions of subsections (a) and (b) of this section.

History. Acts 1975, No. 280, § 1001; 1977, No. 474, § 4; 1981, No. 620, § 9; 1983, No. 409, § 3; A.S.A. 1947, § 41-1001; Acts 1993, No. 532, § 7; 1993, No. 550, § 7; 1995, No. 1009, § 1; 1995, No. 1011, § 1; 1997, No. 1197, § 1; 2001, No. 1553, § 6; 2003, No. 1390, § 2; 2006 (1st Ex. Sess.), No. 5, § 1; 2007, No. 827, §§ 15, 16; 2007, No. 852, § 1; 2009, No. 1395, §§ 1, 2; 2011, No. 570, §§ 19, 20; 2015, No. 895, § 3; 2017, No. 367, §§ 2-4; 2019, No. 910, § 659.

A.C.R.C. Notes. Acts 2015, No. 895, § 1, provided: “Legislative intent. It is the intent of the General Assembly to implement wide-ranging reforms to the criminal justice system in order to address prison overcrowding, promote seamless

reentry into society, reduce medical costs incurred by the state and local governments, aid law enforcement agencies in fighting crime and keeping the peace, and to enhance public safety.”

Amendments. The 2015 amendment inserted (d)(2)(A)(xi) and redesignated the remaining subdivisions accordingly; and inserted (d)(2)(A)(xv)(i) and redesignated former (d)(2)(A)(xv)(i) as (d)(2)(A)(xv)(j).

The 2017 amendment added (c)(2)(A)(x); inserted (d)(2)(A)(xv)(f) and redesignated the remaining subdivisions accordingly; and added (d)(2)(A)(xvi).

The 2019 amendment substituted “Division of Correction” for “Department of Correction” in (f).

CASE NOTES

ANALYSIS

Constitutionality.

Information.

Propriety of Sentence.

Role of Jury or Judge.

Sentences.

Waiver.

Constitutionality.

Trial court did not clearly err by rejecting appellant’s constitutional challenge to this section as conclusory and unsupported by legal authority because there was no showing that *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), was applicable to this section or that this section was unconstitutionally applied in appellant’s case; appellant also did not demonstrate that appellate counsel was ineffective by failing to raise a meritless constitutional challenge on direct appeal. *Wooten v. State*, 2016 Ark. 376, 502 S.W.3d 503 (2016).

Unlike the federal statute addressed in *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), the Arkansas habitual-offender statute does not contain a vague definition of what constitutes a “serious felony involving violence”; instead, the Arkansas statute clearly enumerates the specific crimes that fall within that definition. In any event, ap-

pellant’s sentence was not enhanced based on the nature of the crime. *Wooten v. State*, 2016 Ark. 376, 502 S.W.3d 503 (2016).

Defendant failed to preserve his argument on appeal that the circuit court erred in sentencing him as an habitual offender based on conduct that occurred before the conviction that was used for enhancement purposes; while defendant specifically requested a ruling based on the due-process clauses of the state and federal constitutions, at no time did he assert to the circuit court that the application of the sentencing enhancement provisions violated the ex post facto clause of either constitution. *Stover v. State*, 2017 Ark. 66, 511 S.W.3d 333 (2017).

When a 2015 amendment to subdivision (d)(2) of this section included residential burglary in the list of crimes considered to be felonies involving violence, no ex post facto violation occurred even though defendant’s convictions for residential burglary that were counted toward enhancement of his sentence occurred before the effective date of the amendment. Nothing in subdivision (d)(1) of this section limited counted violent felony convictions to those occurring after the effective date of the statute, appellant did not deny that he had committed four felonies that were now explicitly classified as violent felo-

nies, and appellant was clearly on notice of the date the statutory change became effective. *Handy v. State*, 2017 Ark. App. 74, 510 S.W.3d 292 (2017).

When a 2015 amendment to subdivision (d)(2) of this section included residential burglary in the list of crimes considered to be felonies involving violence, no *ex post facto* violation occurred even though defendant's guilty pleas to residential burglary that were counted toward enhancement of his sentence occurred before the effective date of the amendment. *Brigance v. State*, 2018 Ark. App. 213, 548 S.W.3d 147 (2018).

Information.

Defendant serving sentence for second-degree murder was not entitled to proceed on a writ of error *coram nobis* because (1) his claims that the information was not properly amended and that the sentence was therefore invalid were not extrinsic to the record and could have been made at trial, and (2) a claim of ineffective assistance of counsel for failure to object was not a ground for the writ. *Rainer v. State*, 2019 Ark. 42, 566 S.W.3d 462 (2019).

Propriety of Sentence.

Defendant was charged with only one crime: engaging in a continuing criminal enterprise under § 5-64-405, and although the State charged him as a habitual offender, habitual-offender status is not a separate crime or offense, and the sentence had to be modified accordingly. *Hunter v. State*, 2017 Ark. App. 256, 522 S.W.3d 793 (2017).

Defendant's 10-year sentence for possession of a firearm by a felon was within the statutory range of punishment for a Class D felony committed by a defendant previously convicted of four or more felonies, and the circuit court's decision to run the sentence consecutively to defendant's other sentence was within the court's discretion. *McNeely v. State*, 2017 Ark. App. 483, 530 S.W.3d 876 (2017).

Defendant's claim that he was convicted of an offense for which he was not charged and that he had to be sentenced under subsection (a) of this section did not entitle him to proceed on a writ of error *coram nobis*; the notation concerning subsection (a) of this section on the judgment appeared to be a scrivener's error since the jury was instructed on subsection (c)

of this section and the two prior convictions described in the information did not fall within the parameters of subsection (a) as one was for second-degree murder, and the factual basis for defendant's claims did not implicate the facial validity of the trial court's judgment or jurisdiction. *Rainer v. State*, 2019 Ark. 42, 566 S.W.3d 462 (2019).

Role of Jury or Judge.

Waiver form provided that defendant was facing sentences for up to 15 years, which range clearly showed the enhanced sentencing range, as ordinarily the range was not to exceed six years for a Class D felony, plus the circuit court directly referenced the enhanced punishment ranges and asked defendant if he understood the same; the waiver ensured that defendant understood that, if found guilty, he was to be sentenced by the circuit court, and his waiver was valid. *Johns v. State*, 2014 Ark. App. 560, 444 S.W.3d 873 (2014).

Sentences.

Defendant originally pleaded guilty and was sentenced as a habitual offender, despite the failure of the judgment to indicate that fact; the circuit court was free to correct a clerical error to have the judgment speak the truth, and thus defendant was not illegally sentenced. *Heard v. State*, 2014 Ark. App. 674 (2014).

Defendant's sentence was affirmed because defendant could not challenge his prior convictions used for enhancement purposes for the first time on appeal, his sentence was within the permissible statutory range for a defendant convicted of a Class C felony who had four or more prior felony convictions, and defendant's argument that the State did not prove that he was represented by counsel in each of those convictions was not preserved for appellate review where it was not previously raised. *Slater v. State*, 2015 Ark. App. 94 (2015).

Defendant's sentence on the sexual indecency conviction was illegal to the extent it exceeded 12 years. *McMullin v. State*, 2016 Ark. App. 181, 486 S.W.3d 818 (2016).

Defendant was charged as a habitual offender, having been previously convicted of four felonies, and the jury convicted him of a Class D felony for possessing a usable amount of cocaine, and thus the jury could

have imposed punishment within a range of zero years to not more than 15 years in prison; the circuit court explicitly considered defendant's criminal history and determined that an alternative sentence of probation would not be appropriate, and this was not an abuse of discretion, but an exercise of it. *Wells v. State*, 2017 Ark. App. 174, 518 S.W.3d 106 (2017).

Because defendant received 40 years on each count of threatening a judicial officer, as enhanced under this section, the sentence was above the statutory range and therefore illegal. Defendant's sentence for first-degree terroristic threatening also was facially illegal. *Radford v. State*, 2018 Ark. App. 89, 538 S.W.3d 894 (2018).

Trial court expressly accepted defendant's no-contest plea to domestic battery in the second degree after a lengthy discussion, and because the trial court accepted the plea, it was within the trial court's discretion to determine whether it would allow defendant to withdraw his plea; defendant failed to show that the trial court abused its discretion by not allowing him to withdraw his plea after entry or that a manifest injustice occurred when the trial court increased his active sentence from the 3 years in the agreement to 12 years and then to 20 years because the trial court was within its authority to sentence him under this sec-

tion. *Lee v. State*, 2018 Ark. App. 116, 544 S.W.3d 71 (2018).

Petitioner's appeal of the order dismissing his pro se petition for a writ of habeas corpus was dismissed because his concurrent sentences fell within the maximum sentences allowed under the law at the time the offenses were committed and therefore were not illegal on the face of the judgment and there was no showing that the trial court lacked jurisdiction. *Johnson v. Kelley*, 2019 Ark. 230, 577 S.W.3d 710 (2019).

Waiver.

Because defendant expressly waived presentation of proof as to both charges and the enhancement, the circuit court's denial of his petition to correct an illegal sentence under § 16-90-111 was not clearly erroneous; the circuit court had found that defendant entered a negotiated plea of nolo contendere to false imprisonment and manslaughter, pleaded to the manslaughter charge as a habitual offender, and waived the presentation of proof and evidence as to the charges to which he was eventually sentenced as well as the enhancement of the charges. *Johnson v. State*, 2019 Ark. App. 68, 571 S.W.3d 519 (2019).

Cited: *Coleman v. State*, 2017 Ark. 218 (2017).

5-4-502. Habitual offenders — Sentencing procedure.

CASE NOTES

Compliance.

Trial judge in a bench trial had the authority to enhance defendant's sentence. *Adams v. State*, 2014 Ark. App. 308, 435 S.W.3d 520 (2014).

Cited: *Whitson v. State*, 2014 Ark. App. 283 (2014).

5-4-504. Habitual offenders — Proof of previous conviction.

CASE NOTES

Evidence.

Trial court did not err in considering two Mississippi convictions as proof of defendant's habitual-offender status because there was substantial evidence of defendant's identity due to his unique full name. *Gipson v. State*, 2013 Ark. App. 651 (2013).

Substantial evidence supported the

trial judge's imposing a sentencing enhancement because the prosecution presented a certified copy of a prior felony conviction for defendant, identified as a white male (the same race as defendant) with the same date of birth as defendant. *Adams v. State*, 2014 Ark. App. 308, 435 S.W.3d 520 (2014).

SUBCHAPTER 6 — TRIAL AND SENTENCE — CAPITAL MURDER

SECTION.

- 5-4-602. Capital murder charge — Trial procedure.
- 5-4-606. Life imprisonment without parole.

SECTION.

- 5-4-617. Method of execution.
- 5-4-618. Defendants with intellectual disabilities.

Effective Dates. Acts 2015, No. 1096, § 4: Apr. 6, 2015. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the courts now require heightened legislative oversight and control over the procedures used in carrying out capital punishment. In addition, victims’ families need assurance that capital sentences will be carried out in compliance with prevailing case law. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2017, No. 539, § 14: Mar. 20, 2017. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that in light of recent United States Supreme Court decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, more than one hundred persons in Arkansas are entitled to relief under those decisions; and that this act is immediately necessary in order to make those persons eligible for parole in order to be in compliance with *Montgomery v. Louisiana*. Therefore, an emergency is de-

clared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled ‘Funding and classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-4-602. Capital murder charge — Trial procedure.

The following procedures govern a trial of a person charged with capital murder:

- (1) The jury shall first hear all evidence relevant to the charge and shall then retire to reach a verdict of guilt or innocence;

(2) If the defendant is found not guilty of the capital offense charged but guilty of a lesser included offense, the sentence shall be determined and imposed as provided by law;

(3)(A) If the defendant is found guilty of capital murder, the same jury shall sit again in order to:

(i) Hear additional evidence as provided by subdivisions (4) and (5) of this section; and

(ii) Determine the sentence in the manner provided by § 5-4-603.

(B) However, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, then:

(i) A hearing under subdivision (3)(A) of this section is not required; and

(ii) The trial court shall sentence the defendant to life imprisonment without parole.

(C) If the defendant was less than eighteen (18) years of age at the time of the offense, then a hearing under subdivision (3)(A) of this section is not required;

(4)(A) If the defendant and the state are accorded an opportunity to rebut the evidence, in determining the sentence evidence may be presented to the jury as to any:

(i) Matter relating to an aggravating circumstance enumerated in § 5-4-604;

(ii) Mitigating circumstance; or

(iii) Other matter relevant to punishment, including, but not limited to, victim impact evidence.

(B)(i) Evidence as to any mitigating circumstance may be presented by either the state or the defendant regardless of the evidence's admissibility under the rules governing admission of evidence in a trial of a criminal matter.

(ii) However, mitigating circumstance evidence shall be relevant to the issue of punishment, including, but not limited to, the nature and circumstances of the crime, and the defendant's character, background, history, and mental and physical condition as set forth in § 5-4-605.

(C) The admissibility of evidence relevant to an aggravating circumstance set forth in § 5-4-604 is governed by the rules governing the admission of evidence in a trial of a criminal matter.

(D) Any evidence admitted at the trial relevant to punishment may be considered by the jury without the necessity of reintroducing the evidence at the sentencing proceeding; and

(5) The state and the defendant or his or her counsel are permitted to present argument respecting sentencing:

(A) The state shall open the argument;

(B) The defendant is permitted to reply; and

(C) The state is then permitted to reply in rebuttal.

History. Acts 1975, No. 280, § 1301; A.S.A. 1947, § 41-1301; Acts 1993, No. 1089, § 1; 2017, No. 539, § 5.

A.C.R.C. Notes. Acts 2017, No. 539, § 1, provided: "Title. This act shall be known and may be cited as the 'Fair Sentencing of Minors Act of 2017'."

Acts 2017, No. 539, § 2, provided: "Legislative intent.

"(a)(1) The General Assembly acknowledges and recognizes that minors are constitutionally different from adults and that these differences must be taken into account when minors are sentenced for adult crimes.

"(2) As the United States Supreme Court quoted in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control'.

"(3) Minors are more vulnerable to negative influences and outside pressures, including from their family and peers, and they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

"(4) The United States Supreme Court has emphasized through its cases in

Miller, Roper v. Simmons, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), that 'the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes'.

"(5) Youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society.

"(b) In the wake of these United States Supreme Court decisions and the emerging juvenile brain and behavioral development science, several states, including Texas, Utah, South Dakota, Wyoming, Nevada, Iowa, Kansas, Kentucky, Montana, Alaska, West Virginia, Colorado, Hawaii, Delaware, Connecticut, Vermont, Massachusetts, and the District of Columbia, have eliminated the sentence of life without parole for minors.

"(c) It is the intent of the General Assembly to eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing standards in compliance with the United States Constitution for minors who commit serious crimes."

Amendments. The 2017 amendment, in (3)(B)(i), substituted "A hearing" for "No hearing" and "is not" for "is"; and added (3)(C).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of Pattern and Nonpattern Jury

Instructions in State Death Penalty Proceedings. 83 A.L.R.6th 255.

CASE NOTES

ANALYSIS

Death Penalty.

Mitigating Circumstances.

Death Penalty.

Circuit court did not abuse its discretion in allowing the State's penalty-phase rebuttal closing argument because the State's comments were not specifically designed to appeal to the jurors' passions; the State briefly summarized the reasons why it chose to pursue the death penalty, namely, that defendant had shot the vic-

tim with a crossbow and that he lacked remorse. *Smith v. State*, 2018 Ark. 277, 555 S.W.3d 881 (2018).

Mitigating Circumstances.

Circuit court did not commit reversible error by excluding defendant's offer to plead guilty to capital murder in exchange for a life sentence, as evidence of a mitigating factor, i.e., acceptance of responsibility for his crime. The offer to plead with the stated condition was not relevant mitigating evidence, as evidence that defendant offered to plead guilty in exchange

for a lesser sanction was not evidence that he was taking responsibility for his crime. *Holly v. State*, 2017 Ark. 201 (2017).

5-4-603. Findings required for death sentence — Harmless error review.

RESEARCH REFERENCES

Ark. L. Rev. Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267 (2017).

CASE NOTES

ANALYSIS

Verdict Forms.
Victim Impact Evidence.

Verdict Forms.

Submission of a single set of verdict forms deprived the jury of the opportunity to separately consider the circumstances surrounding each of the murders in determining the punishment to be assessed for each count. Submission of a single set of forms was an error that impacted the validity of the death sentence imposed by the jury. *Wertz v. State*, 2016 Ark. 249, 493 S.W.3d 772 (2016).

Although the jury completed the verdict forms it was given, the erroneous submission of a single set of forms deprived the

jury of the opportunity to determine which aggravators applied to which of the murders. The presence of a defect in the appellate process and the fact that appellant received a sentence of death weighed heavily in favor of the Supreme Court granting a motion to recall the mandate and ordering resentencing. *Wertz v. State*, 2016 Ark. 249, 493 S.W.3d 772 (2016).

Victim Impact Evidence.

Circuit court properly denied defendant's claim for postconviction relief because the victim-impact testimony requesting life without parole for his murder conviction was not prejudicial as defendant received a 40-year sentence. *Liggins v. State*, 2016 Ark. 432, 505 S.W.3d 191 (2016).

5-4-604. Aggravating circumstances.

CASE NOTES

ANALYSIS

Appellate Review.
Multiple Deaths.

Appellate Review.

In a death penalty case, defendant's argument that the circuit court erred in permitting the jury to consider the death of the victim's unborn child as an aggravating circumstance was abandoned below and could not be raised on appeal because defendant did not conclusively show prejudice, and he failed to show that the Supreme Court would unquestionably grant him Rule 37 relief on the issue.

Smith v. State, 2018 Ark. 277, 555 S.W.3d 881 (2018).

Multiple Deaths.

Wicks exception for matters essential to consideration of the death penalty did not apply to the circuit court's failure to bring to the jury's attention that a "person" could not be an unborn child as it applies to the aggravating circumstances listed in this section; while the prosecutor chose not to file a separate homicide charge for the death of the victim's unborn child, he could have. *Smith v. State*, 2018 Ark. 277, 555 S.W.3d 881 (2018).

5-4-605. Mitigating circumstances.**CASE NOTES**

Cited: True v. State, 2017 Ark. 323, 532 S.W.3d 70 (2017).

5-4-606. Life imprisonment without parole.

A person sentenced to life imprisonment without parole shall:

(1) Be remanded to the custody of the Division of Correction for imprisonment for the remainder of his or her life; and

(2) Not be released except pursuant to commutation, pardon, or reprieve of the Governor.

History. Acts 1975, No. 280, § 1305; A.S.A. 1947, § 41-1305; Acts 2019, No. 910, § 660.

Amendments. The 2019 amendment substituted “Division of Correction” for “Department of Correction” in (1).

CASE NOTES**Possible Release.**

Circuit court did not err in concluding that petitioner failed to satisfy the prejudice prong of Strickland and, therefore, was not entitled to relief because the mere fact that the jury chose the more severe of two possible punishments was not a sufficient demonstration of prejudice in light of

the aggravators found to exist by the jury; trial counsel’s statement that petitioner could be pardoned if he received a life sentence, although unnecessary, was a correct statement of the law. Sales v. State, 2014 Ark. 384, 441 S.W.3d 883 (2014).

5-4-607. Application for executive clemency — Regulations.**RESEARCH REFERENCES**

ALR. Judicial Investigation of Pardon by Governor. 101 A.L.R.6th 431 (2015).

5-4-608. Waiver of death penalty.**CASE NOTES****Ineffective Assistance of Counsel.**

Trial court properly found appellant’s guilty plea was voluntarily and intelligently entered because trial counsel’s advice that he faced a death sentence was not erroneous as the death penalty remained a potential outcome of any trial; no evidence or testimony was introduced

to establish that the death penalty had been waived, and the circumstances surrounding the death of the victim and her unborn child supported counsel’s reasonable belief that appellant faced a potential death sentence. True v. State, 2017 Ark. 323, 532 S.W.3d 70 (2017).

5-4-615. Conviction — Punishments.**CASE NOTES****Assistance of Counsel.**

Trial court did not clearly err when it found that appellant's guilty plea was voluntarily and intelligently entered because trial counsel was not ineffective for allegedly pressuring appellant into pleading guilty to avoid the death penalty; although appellant argued that the pros-

ecutor had not filed notice of intent to seek the death penalty, the circumstances surrounding the death of the victim and her unborn child supported trial counsel's reasonable belief that appellant faced a potential death sentence. *True v. State*, 2017 Ark. 323, 532 S.W.3d 70 (2017).

5-4-617. Method of execution.

(a) The Division of Correction shall carry out the sentence of death by intravenous lethal injection of the drug or drugs described in subsection (c) of this section in an amount sufficient to cause death.

(b) The Director of the Division of Correction or his or her designee may order the dispensation and administration of the drug or drugs described in subsection (c) of this section for the purpose of carrying out the lethal-injection procedure, and a prescription is not required.

(c) The division shall select one (1) of the following options for a lethal-injection protocol, depending on the availability of the drugs:

(1) A barbiturate; or

(2) Midazolam, followed by vecuronium bromide, followed by potassium chloride.

(d) The drug or drugs described in subsection (c) of this section used to carry out the lethal injection shall be:

(1) Approved by the United States Food and Drug Administration and made by a manufacturer approved by the United States Food and Drug Administration;

(2) Obtained from a facility registered with the United States Food and Drug Administration; or

(3) Obtained from a compounding pharmacy that has been accredited by a national organization that accredits compounding pharmacies.

(e) The drugs set forth in subsection (c) of this section shall be administered along with any additional substances, such as saline solution, called for in the instructions.

(f) Catheters, sterile intravenous solution, and other equipment used for the intravenous injection of the drug or drugs set forth in subsection (c) of this section shall be sterilized and prepared in a manner that is safe and commonly performed in connection with the intravenous administration of drugs of that type.

(g) The director shall develop logistical procedures necessary to carry out the sentence of death, including:

(1) The following matters:

(A) Ensuring that the drugs and substances set forth in this section and other necessary supplies for the lethal injection are available for use on the scheduled date of the execution;

(B) Conducting employee orientation of the lethal injection procedure before the day of the execution;

(C) Determining the logistics of the viewing;

(D) Coordinating with other governmental agencies involved with security and law enforcement;

(E) Transferring the condemned prisoner to the facility where the sentence of death will be carried out;

(F) Escorting the condemned prisoner from the holding cell to the execution chamber;

(G) Determining the identity, arrival, and departure of the persons involved with carrying out the sentence of death at the facility where the sentence of death will be carried out; and

(H) Making arrangements for the disposition of the condemned prisoner's body and personal property; and

(2) The following matters pertaining to other logistical issues:

(A) Chaplaincy services;

(B) Visitation privileges;

(C) Determining the condemned prisoner's death, which shall be pronounced according to accepted medical standards; and

(D) Establishing a protocol for any necessary mixing or reconstitution of the drugs and substances set forth in this section in accordance with the instructions.

(h) The procedures for carrying out the sentence of death and related matters are not subject to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(i)(1) Except as provided for under subdivision (i)(2) of this section, a person shall not disclose in response to a request under the Freedom of Information Act of 1967, § 25-19-101 et seq., or in response to discovery under the Arkansas Rules of Civil Procedure, or otherwise, any of the following:

(A) Documents, records, or information that may identify or reasonably lead to the identification of entities or persons who participate in the execution process or administer lethal injections;

(B) Documents, records, or information that may identify or reasonably lead directly or indirectly to the identification of an entity or person who compounds, synthesizes, tests, sells, supplies, manufactures, transports, procures, dispenses, or prescribes the drug or drugs described in subsection (c) of this section, or that provides the medical supplies or medical equipment for the execution process; or

(C) Documents, records, or information that concern the procedures under subdivision (g)(1) of this section and the implementation of the procedures under subdivision (g)(1) of this section.

(2) The following documents, records, and information may be disclosed:

(A) The director may disclose or authorize disclosure of documents, records, and information to his or her subordinates, contractors, or vendors to the extent necessary to carry out his or her duties under this section;

(B) The director may disclose or authorize disclosure of documents, records, and information to the Governor or the Attorney General, or both; and

(C) The Governor or the Attorney General, or both, may disclose or authorize the disclosure of documents, records, and information to their subordinates to the extent necessary to carry out their duties under law.

(3)(A) If any part of this subsection is invalidated by a final and unappealable court order, any unauthorized disclosure of information under this section shall be permitted only after the entry and service of an order prohibiting public disclosure or use of the documents, records, or information and requiring that a public filing of the documents, records, or information be done under seal.

(B) A person who recklessly discloses documents, records, or information in violation of an order under this subdivision (i)(3) upon conviction is guilty of a Class D felony.

(j)(1) The director shall certify under oath that the drug or drugs described in subsection (c) of this section meet the requirements of subsection (d) of this section.

(2) After the certification required under this subsection, a challenge to the conformity of the drug or drugs described under subsection (c) of this section with the requirements of subsection (d) of this section shall be brought only as an original action in the Supreme Court.

(k) The division shall make available to the public any of the following information upon request, so long as the information that may be used to identify an entity or person listed in subsection (i) of this section is redacted and maintained as confidential:

(1) The certification provided for under subsection (j) of this section; and

(2) The division's procedure for administering the drug or drugs described in subsection (c) of this section.

(l) The division shall carry out the sentence of death by electrocution if execution by lethal injection under this section is invalidated by a final and unappealable court order.

(m) Every person that procures, prepares, administers, monitors, or supervises the injection of a drug or drugs under this section has immunity under § 19-10-305.

(n) A person who recklessly discloses documents, records, or information in violation of subdivision (i)(1) of this section upon conviction is guilty of a Class D felony.

History. Acts 1983, No. 774, §§ 1, 5, 6; A.S.A. 1947, §§ 41-1352, 41-1356, 41-1357; Acts 2009, No. 1296, § 2; 2013, No. 139, § 2; 2015, No. 1096, § 2; 2019, No. 810, § 3.

A.C.R.C. Notes. Acts 2015, No. 1096, § 1, provided: "Legislative findings.

"(a) The laws of Arkansas impose the sentence of death for its most serious

offenses. The General Assembly finds it necessary to provide a means of carrying out the sentence of death while also complying with the constitutional prohibition on cruel and unusual punishment.

"(b) To address objections to the method of lethal injection previously provided by law and to address the problem of drug shortages, the General Assembly

finds that it should adopt alternative methods of lethal injection to bring about the death of the condemned prisoner.

“(c) The General Assembly finds that this act meets those goals and satisfies the separation-of-powers doctrine by setting forth the state’s policy and the procedural guidelines for carrying out the sentence of death.”

Acts 2015, No. 1096, § 3, provided: “SEVERABILITY CLAUSE. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.”

Acts 2019, No. 810, § 1, provided: “Legislative findings. The General Assembly finds that:

“(1) As United States Supreme Court Justice Samuel Alito has explained, there is a well-documented guerilla war being waged against the death penalty;

“(2) Anti-death-penalty advocates have pressured pharmaceutical companies to refuse to supply the drugs used by states to carry out death sentences;

“(3) The Department of Correction is unable to acquire the necessary drugs

used to carry out lethal injections due to the lack of effective confidentiality regarding the manufacturers, suppliers, and others involved in the provision of lethal injection drugs; and

“(4) Any disclosure of the information described under this act, beyond disclosure to the government officials required to carry out their duties under law, is detrimental to the carrying out of lawful sentences of executions.”

Acts 2019, No. 810, § 2, provided: “Legislative intent. It is the intent of the General Assembly:

“(1) To ensure absolute confidentiality of any documents, records, or information that could lead to the identification of a person or entity involved in any way in the Department of Correction’s provisioning of drugs used for lethal injections; and

“(2) That the confidentiality provisions of this act be construed as broadly as possible to ensure that the Department of Correction is able to acquire the drugs necessary for lethal injections.”

Amendments. The 2015 amendment rewrote the section.

The 2019 amendment rewrote (i); inserted (j); rewrote and redesignated former (j) as (k); redesignated former (k) and (l) as (l) and (m); and added (n).

RESEARCH REFERENCES

Ark. L. Rev. Lauren E. Murphy, Comment: Third Time’s a Charm: Whether *Hobbs v. Jones* Inspired a Durable Change to Arkansas’s Method of Execution Act, 66 Ark. L. Rev. 813 (2013).

Daisy C. Karlson, Recent Developments: Arkansas Supreme Court Upholds

State’s Death Penalty Three-Drug Protocol, *Kelley v. Johnson*, 69 Ark. L. Rev. 871 (2016).

Julie Vandiver, Eleven Years of Lethal Injection Challenges in Arkansas, 70 Ark. L. Rev. 409 (2017).

CASE NOTES

ANALYSIS

Constitutionality.
FOIA Requests.
Stay of Execution.

Constitutionality.

Acts 2013, No. 139 did not violate separation of powers by delegating to the Arkansas Department of Correction power to select a barbiturate to use in lethal injections because Act 139 gave guidance on how to carry out the death penalty,

drugs to be used, the order in which to administer the drugs, how much to administer, and the policy for carrying out the death penalty; thus, reasonable guidelines bounded Act 139’s delegation of authority. *Hobbs v. McGehee*, 2015 Ark. 116, 458 S.W.3d 707 (2015) (decided under former version of statute).

Acts 2013, No. 139 was not unconstitutional for not stating qualifications of those involved in lethal injections because such level of detail was not constitutionally required. *Hobbs v. McGehee*, 2015

Ark. 116, 458 S.W.3d 707 (2015) (decided under former version of statute).

In challenging a method of execution under Ark. Const., Art. 2, § 9, the burden falls squarely on a prisoner to show that (1) the current method of execution presents a risk that is sure or very likely to cause serious illness and needless suffering and that gives rise to sufficiently imminent dangers; and (2) there are known, feasible, readily implemented, and available alternatives that significantly reduce a substantial risk of severe pain. *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016), cert. denied, 137 S. Ct. 1067, 197 L. Ed. 2d 235 (2017).

In a suit challenging this section, the prisoners failed to meet their burden under Ark. Const., Art. 2, § 9, where they had not shown that the proposed alternative drugs were available to the Arkansas Department of Correction for use in an execution. *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016), cert. denied, 137 S. Ct. 1067, 197 L. Ed. 2d 235 (2017).

Ark. Const., Art. 2, § 8, did not compel the disclosure of the identity of the supplier of the drugs used in executions where the Arkansas Department of Correction voluntarily submitted the drugs it had obtained to an independent laboratory for testing, the test results confirmed that the contents of the vials match the FDA-approved labeling and revealed that all three drugs meet applicable potency requirements, and thus, identifying the supplier of the drugs served no useful purpose in establishing the prisoners' claim. *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016), cert. denied, 137 S. Ct. 1067, 197 L. Ed. 2d 235 (2017).

Disclosure of the suppliers of execution drugs was not required under Ark. Const., Art. 2, § 6, where the current supplier of the drugs agreed to provide them only on the condition of anonymity, that supplier was no longer inclined to sell the drugs to the Arkansas Department of Correction, and thus, disclosing the information was actually detrimental to the process. *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016), cert. denied, 137 S. Ct. 1067, 197 L. Ed. 2d 235 (2017).

This section did not offend Ark. Const., Art. 19, § 12, where it was left to the General Assembly to determine the time and the manner for the disclosure of public expenditures, and the General Assem-

bly determined that any disclosure was to be made by the Arkansas Department of Correction in litigation on the condition that it first apply for a protective order. *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346 (2016), cert. denied, 137 S. Ct. 1067, 197 L. Ed. 2d 235 (2017).

FOIA Requests.

Review of the entirety of this section reveals that the Legislature explicitly referred to a manufacturer of lethal drugs in two different subdivisions, (d)(1) and (j)(1). This demonstrates that the Legislature was aware of the differences between the terms manufacturer, seller, and supplier and that it could have easily included manufacturer among the entities whose identity was confidential for purposes of the Method of Execution Act had it intended to do so. *Ark. Dep't of Corr. v. Shults*, 2017 Ark. 300, 529 S.W.3d 628 (2017).

Circuit court was correct in determining that the identity of lethal drug manufacturers was not protected under the confidentiality provisions of this section where the language of the entire statute revealed that the Legislature treated manufacturers differently than sellers and suppliers, and treating a manufacturer the same as a supplier and seller would have rendered subdivision (j)(1) meaningless and would have defeated the purpose of requiring FDA-approved drugs. *Ark. Dep't of Corr. v. Shults*, 2017 Ark. 300, 529 S.W.3d 628 (2017).

Department of Correction was required to redact and maintain as confidential information such as lot, control, and/or batch numbers from the labels and/or package inserts as that information could lead to the identification of the seller and/or supplier of the drug used for execution. *Ark. Dep't of Corr. v. Shults*, 2017 Ark. 300, 529 S.W.3d 628 (2017).

Although the identity of drug manufacturers was not protected under the confidentiality provisions of the Method of Execution Act, § 5-4-617, disclosure of information such as lot, batch, and/or control numbers could have led to the identification of the seller and/or supplier of the potassium chloride; thus, the Department of Correction was required to redact and maintain that information as confidential. *Ark. Dep't of Corr. v. Shults*, 2018 Ark. 94, 541 S.W.3d 410 (2018).

Stay of Execution.

Prisoners were entitled to stay of executions pending resolution of litigation pending in the lower court because the prisoners filed their complaint immediately after Acts 2015, No. 1096 was en-

acted, their complaint contained bona fide constitutional claims, and the first executions were set for October 21, 2015. *Kelley v. Griffen*, 2015 Ark. 375, 472 S.W.3d 135 (2015).

5-4-618. Defendants with intellectual disabilities.

(a)(1) As used in this section, “intellectual disabilities” means:

(A) Significantly below-average general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than eighteen (18) years of age; and

(B) A deficit in adaptive behavior.

(2) There is a rebuttable presumption of intellectual disabilities when a defendant has an intelligence quotient of sixty-five (65) or below.

(b) No defendant with intellectual disabilities at the time of committing capital murder shall be sentenced to death.

(c) The defendant has the burden of proving intellectual disabilities at the time of committing the offense by a preponderance of the evidence.

(d)(1) A defendant on trial for capital murder shall raise the special sentencing provision of intellectual disabilities by motion prior to trial.

(2)(A) Prior to trial, the court shall determine if the defendant has an intellectual disability.

(B)(i) If the court determines that the defendant does not have an intellectual disability, the defendant may raise the question of an intellectual disability to the jury for determination de novo during the sentencing phase of the trial.

(ii) At the time the jury retires to decide mitigating and aggravating circumstances, the jury shall be given a special verdict form on an intellectual disability.

(iii) If the jury unanimously determines that the defendant had an intellectual disability at the time of the commission of capital murder, then the defendant will automatically be sentenced to life imprisonment without possibility of parole.

(C) If the court determines that the defendant has an intellectual disability, then:

(i) The jury is not “death qualified”; and

(ii) The jury shall sentence the defendant to life imprisonment without possibility of parole upon conviction.

(e) However, this section is not deemed to:

(1) Require unanimity for consideration of any mitigating circumstance; or

(2) Supersede any suggested mitigating circumstance regarding mental defect or disease currently found in § 5-4-605.

History. Acts 1993, No. 420, § 1; 2019, No. 1035, § 3.

Amendments. The 2019 amendment substituted “Defendants with intellectual disabilities” for “Mental retardation” in the section heading; substituted “intellec-

tual disabilities” for “‘mental retardation’” in the introductory language of (a)(1) and made similar changes throughout the section; and substituted “below-average” for “subaverage” in (a)(1)(A).

CASE NOTES

Applicability.

Prisoner who had filed a federal habeas petition after being sentenced to death in state court for capital murder was entitled to have the district court’s finding that the prisoner was not mentally retarded vacated because the district court’s miscon-

ceptions about the Arkansas mental retardation legal standard led it to answer the wrong factual questions, and the legal errors were not harmless since it would not be unreasonable for a factfinder to find the prisoner mentally retarded. *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013).

SUBCHAPTER 7 — ENHANCED PENALTIES FOR CERTAIN OFFENSES

SECTION.

5-4-701. Definitions.

5-4-702. Enhanced penalties for offenses committed in presence of a child.

5-4-703. Additional fine — Offense committed against a child or in the presence of a child.

5-4-704. Sentence enhancement for offense targeting current or former law enforcement officer, first responder, or family member of current

SECTION.

or former law enforcement officer or first responder.

5-4-705. Sentence enhancement for offense targeting railroad or public transit employee.

5-4-706. Local cybercrime fee.

5-4-707. Additional term of imprisonment for offense constituting violence against church or other place of worship.

Effective Dates. Acts 2017, No. 332 § 4: Mar. 3, 2017. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that current and former law enforcement officers, first responders, and their family members are oftentimes specifically targeted for a criminal offense based on who they are and the dangerous and necessary job that law enforcement officers and first responders do; that persons who commit offenses targeted at current and former law enforcement officers, first responders, or their family members should be sentenced more harshly than is currently provided for in the law; and that this act is immediately necessary because

a message needs to be sent that the State of Arkansas does not condone the targeting of current and former law enforcement officers, first responders, or their family members for criminal activity. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

5-4-701. Definitions.

As used in this subchapter:

- (1) “Child” means a person under eighteen (18) years of age;
- (2) “Conductor” means a conductor, switchman, brakeman, trainman, or fireman licensed and certified by the Federal Railroad Administration;
- (3) “Engineer” means an engineer licensed and certified by the Federal Railroad Administration;
- (4) “Family member of a current or former law enforcement officer or first responder” means the husband, wife, son, daughter, brother, sister, or parent of a current or former law enforcement officer or first responder;
- (5) “First responder” means a firefighter or a person employed as an emergency medical provider;
- (6) “In the presence of a child” means in the physical presence of a child or knowing or having reason to know that a child is present and may see or hear an act;
- (7) “Law enforcement officer” includes without limitation a:
 - (A) Prosecuting attorney or a deputy prosecuting attorney;
 - (B) Code enforcement officer; and
 - (C) Corrections officer;
- (8) “Public transit employee” means a bus, rail, or trolley operator tasked with the transport of persons;
- (9) “Railroad or public transit employee” means a conductor, engineer, public transit employee, or railroad management; and
- (10) “Railroad management” means a rail employee overseeing and assisting in the operation of rail transit.

History. Acts 2001, No. 1707, § 1; 2005, No. 1994, § 290; 2009, No. 33, § 1; 2011, No. 1120, § 5; 2017, No. 332, § 2; 2017, No. 714, § 1; 2017, No. 955, § 1.

Publisher’s Notes. Acts 2017, No. 955, § 1 specifically amended this section as amended by Acts 2017, No. 332.

Amendments. The 2017 amendment by No. 332 added the definitions for “Family member of a current or former law enforcement officer or first responder”,

“First responder”, and “Law enforcement officer”.

The 2017 amendment by No. 714 substituted “eighteen (18)” for “sixteen (16)” in (1).

The 2017 amendment by No. 955 added the definitions for “Conductor”, “Engineer”, “Public transit employee”, “Railroad or public transit employee”, and “Railroad management”.

CASE NOTES

In the Presence of a Child.

Evidence at trial was sufficient to prove that defendant “had reason to know” that a person under the age of 16 was present at the time he shot the victim; the testimony showed that eight children were at the house the day of the shooting, six of whom were under the age of 16, one child

had come out on the porch immediately before the shooting while defendant was in the driveway, and several children were on the porch while defendant was firing his gun. Thus, the circuit court did not err in denying defendant’s motion for directed verdict on the enhancement under § 5-4-702 for committing the offense of battery

in the presence of a child. *Williams v. State*, 2019 Ark. App. 152, 573 S.W.3d 547 (2019).

5-4-702. Enhanced penalties for offenses committed in presence of a child.

(a) A person who commits any of the following offenses may be subject to an enhanced sentence of an additional term of imprisonment of not less than one (1) year and not greater than ten (10) years if the offense is committed in the presence of a child:

- (1) Capital murder, § 5-10-101;
- (2) Murder in the first degree, § 5-10-102;
- (3) Murder in the second degree, § 5-10-103;
- (4) Aggravated robbery, § 5-12-103;
- (5) A felony offense of assault or battery under § 5-13-201 et seq.;
- (6) Rape, § 5-14-103;
- (7) Sexual assault in the second degree, § 5-14-125; or
- (8) A felony offense of domestic battering or assault on a family or household member under §§ 5-26-303 — 5-26-309.

(b) Any person who commits the offense of aggravated cruelty to a dog, cat, or equine under § 5-62-104 may be subject to an enhanced sentence of an additional term of imprisonment not to exceed five (5) years if the offense is committed in the presence of a child.

(c)(1) To seek an enhanced penalty established in this section, a prosecuting attorney shall notify the defendant in writing that the defendant is subject to the enhanced penalty.

(2) If the defendant is charged by information or indictment, the prosecuting attorney may include the written notice in the information or indictment.

(d) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(e) Any person convicted under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

History. Acts 2001, No. 1707, § 2; 2007, No. 1047, § 1; 2009, No. 33, § 1; 2009, No. 936, § 1; 2017, No. 389, § 1; 2019, No. 324, § 1.

Amendments. The 2017 amendment substituted “equine” for “horse” in (b).

The 2019 amendment substituted “A person who commits any of the following offenses may be subject” for “Any person

who commits a felony offense involving homicide, §§ 5-10-101 – 5-10-103, assault or battery, § 5-3-201 et seq., or domestic battering or assault on a family member or household member, §§ 5-26-303 – 5-26-309, may be subject” in the introductory language of (a) and added (a)(1) through (a)(8).

RESEARCH REFERENCES

Ark. L. Rev. Mark James Chaney, Recent Developments: Arkansas Supreme Court Denies Judges’ Discretion to Sus-

pend Enhanced Criminal Sentences Imposed by Statute and Holds All Suspensions of Enhanced Sentences Allowed

Under Law Must Run Concurrently with the Primary Sentence, 66 Ark. L. Rev. 907 (2013).

CASE NOTES

ANALYSIS

Construction.
Evidence.

Construction.

Trial court lacked authority to impose a 10-year enhanced sentence on defendant for committing manslaughter in the presence of a child because the sentence was illegal where manslaughter was not referenced in the enhancement statute. *Hart v. State*, 2014 Ark. 250 (2014).

Evidence.

Evidence was sufficient for the enhancement under this section where a sibling was tearful and shaken and indicated to responding officers that she was not okay, she had heard the sounds of her brother being beaten and her mother pleading, and defendant knew or had reason to know that the sibling lived in the home with her brother and would be there. *Jefferson v. State*, 2017 Ark. App. 492, 532 S.W.3d 75 (2017).

When a statute, such as the definition of “in the presence of a child” under § 5-4-701, provides that a defendant must know or have reason to know a fact, the defendant’s knowledge may be inferred from the circumstances. *Williams v. State*, 2019 Ark. App. 152, 573 S.W.3d 547 (2019).

Evidence at trial was sufficient to prove that defendant “had reason to know” that a person under the age of 16 was present at the time he shot the victim; the testimony showed that eight children were at the house the day of the shooting, six of whom were under the age of 16, one child had come out on the porch immediately before the shooting while defendant was in the driveway, and several children were on the porch while defendant was firing his gun. Thus, the circuit court did not err in denying defendant’s motion for directed verdict on the enhancement for committing the offense of battery in the presence of a child. *Williams v. State*, 2019 Ark. App. 152, 573 S.W.3d 547 (2019).

5-4-703. Additional fine — Offense committed against a child or in the presence of a child.

(a) In addition to any other sentence, the court shall assess an additional fine of one hundred dollars (\$100) for the following offenses if the finder of fact determines that the offense was committed against a child or in the presence of a child:

- (1) A felony involving violence as defined in § 5-4-501(d)(2);
- (2) Manslaughter, § 5-10-104, or negligent homicide, § 5-10-105;
- (3) False imprisonment in the first degree, § 5-11-103, or false imprisonment in the second degree, § 5-11-104;
- (4) Battery in the second degree, § 5-13-202, or battery in the third degree, § 5-13-203;
- (5) Aggravated assault, § 5-13-204, assault in the first degree, § 5-13-205, assault in the second degree, § 5-13-206, assault in the third degree, § 5-13-207, or coercion, § 5-13-208;
- (6) Introduction of controlled substance into body of another person, § 5-13-210;
- (7) Terroristic threatening, § 5-13-301, or terroristic act, § 5-13-310;
- (8) Sexual indecency with a child, § 5-14-110, indecent exposure, § 5-14-112, sexual assault in the third degree, § 5-14-126, or sexual assault in the fourth degree, § 5-14-127;

(9) Trafficking of persons, § 5-18-103, or patronizing a victim of human trafficking, § 5-18-104;

(10) Domestic battering in the second degree, § 5-26-304, domestic battering in the third degree, § 5-26-305, aggravated assault on a family or household member, § 5-26-306, first degree assault on a family or household member, § 5-26-307, second degree assault on a family or household member, § 5-26-308, or third degree assault on a family or household member, § 5-26-309;

(11) Endangering the welfare of a minor in the first degree, § 5-27-205, endangering the welfare of a minor in the second degree, § 5-27-206, or endangering the welfare of a minor in the third degree, § 5-27-207;

(12) Engaging in sexually explicit conduct for use in visual or print medium, § 5-27-303, pandering or possessing visual or print medium depicting sexually explicit conduct involving a child, § 5-27-304, transportation of minors for prohibited sexual conduct, § 5-27-305, internet stalking of a child, § 5-27-306, or sexually grooming a child, § 5-27-307;

(13) Employing or consenting to the use of a child in a sexual performance, § 5-27-402, or producing, directing, or promoting a sexual performance by a child, § 5-27-403;

(14) Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child, § 5-27-602, computer child pornography, § 5-27-603, failure to report child pornography, § 5-27-604, or computer exploitation of a child, § 5-27-605;

(15) Fleeing, if under § 5-54-125(d);

(16) Aggravated cruelty to a dog, cat, or equine, § 5-62-104;

(17) A controlled substance offense in which an enhanced penalty under § 5-64-406 or § 5-64-407 is applied;

(18) Driving or boating while intoxicated, § 5-65-103; or

(19) Reckless driving, § 27-50-308.

(b)(1) A fine assessed and collected under this section shall be remitted on or before the fifteenth day of the following month to the Arkansas Children's Advocacy Center Fund under § 19-5-1260.

(2) A form identifying the amount of fines assessed under this section shall be transmitted with the collected fines.

History. Acts 2015, No. 1220, § 1; 2017, No. 389, § 2; 2017, No. 714, § 2.

Amendments. The 2017 amendment by No. 389 substituted "equine" for "horse" in (a)(16).

The 2017 amendment by No. 714 substituted "one hundred dollars (\$100)" for

"twenty-five dollars (\$25.00)" in (a); inserted (a)(15); redesignated former (a)(15) as (a)(17) and former (a)(17) as (a)(18); added (a)(19); and added "under § 19-5-1260" at the end of (b)(1).

5-4-704. Sentence enhancement for offense targeting current or former law enforcement officer, first responder, or family member of current or former law enforcement officer or first responder.

(a) A person is subject to an enhanced sentence under this section if the person purposely selected the victim of an offense committed by the person because the victim is:

(1) Currently employed or was formerly employed as a law enforcement officer or first responder; or

(2) A family member of a current or former law enforcement officer or first responder.

(b) If a sentence enhancement is sought under this section, the information or indictment shall include:

(1) That the sentence enhancement under this section is being sought; and

(2) The allegations supporting the imposition of the enhanced sentence under this section.

(c) The sentence enhancement under this section is as follows:

(1) If the person is convicted of a Class A misdemeanor or an unclassified misdemeanor with a possible sentence greater than ninety (90) days' imprisonment, an additional period of imprisonment of not more than one (1) year;

(2) If the person is convicted of a Class C felony, Class D felony, or an unclassified felony, an additional period of imprisonment of at least six (6) months but no more than two (2) years; and

(3) If the person is convicted of a Class Y felony, Class A felony, or Class B felony, an additional period of imprisonment of at least two (2) years but no more than ten (10) years.

(d) The sentence enhancement under this section is not applicable if:

(1) The victim of the offense is a law enforcement officer or first responder; and

(2) An element of the underlying offense is that the victim is a law enforcement officer or first responder.

History. Acts 2017, No. 332, § 3.

A.C.R.C. Notes. Acts 2017, No. 332, § 1, provided: "Legislative intent.

"(a) The General Assembly finds that there are a number of criminal offenses that have heightened or enhanced sentences when the victim is a law enforcement officer or first responder as opposed to if the victim of a similar criminal offense were just a member of the public at large.

"(b) The sentence enhancement under Section 3 of this act is not intended to apply to criminal offenses against a law enforcement officer or first responder

when the criminal offenses already provide for a heightened or enhanced sentence because the victim is a law enforcement officer or first responder.

"(c) Therefore, it is the intent of the General Assembly that subsection (d) of Section 3 of this act prohibits a sentence enhancement under Section 3 of this act when the victim of the criminal offense is a law enforcement officer or first responder and the criminal offense for which the defendant was charged could only be committed against a law enforcement officer or first responder."

5-4-705. Sentence enhancement for offense targeting railroad or public transit employee.

(a) A person is subject to an enhanced sentence under this section if the person purposely selected the victim of an offense committed by the person because the victim is a railroad or public transit employee.

(b) If a sentence enhancement is sought under this section, the information or indictment shall include:

(1) That the sentence enhancement under this section is being sought; and

(2) The allegations supporting the imposition of the enhanced sentence under this section.

(c) The sentence enhancement under this section is as follows:

(1) If the person is convicted of a Class A misdemeanor or an unclassified misdemeanor with a possible sentence greater than ninety (90) days' imprisonment, an additional period of imprisonment of not more than one (1) year;

(2) If the person is convicted of a Class C felony, Class D felony, or an unclassified felony, an additional period of imprisonment of at least six (6) months but no more than two (2) years; and

(3) If the person is convicted of a Class Y felony, Class A felony, or Class B felony, an additional period of imprisonment of at least two (2) years but no more than ten (10) years.

History. Acts 2017, No. 955, § 2.

5-4-706. Local cybercrime fee.

(a) As used in this section, "applicable felony" means:

(1) A felony involving violence as defined in § 5-4-501(d)(2);

(2) A felony offense for which a person is required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.; or

(3) A felony offense under § 12-12-904.

(b) In addition to any other fee authorized or required by law, a circuit court shall assess an additional fee of up to five hundred dollars (\$500) for each applicable felony conviction for an offense that the trier of fact finds:

(1) Involved the use of a computer, an electronic device, or the internet; and

(2) The investigation of which expended specialized law enforcement personnel or materials designed to investigate offenses involving a computer, an electronic device, or the internet.

(c)(1)(A) A fee provided for under subsection (b) of this section and collected in a circuit court shall be remitted by the tenth day of each month to a special cybercrime fee law enforcement fund to be administered by the prosecuting attorney.

(B) The special cybercrime fee law enforcement fund shall consist of moneys obtained under this section or as otherwise provided for by law.

(2) Moneys in the special cybercrime fee law enforcement fund shall be expended on a periodic basis and upon a showing of necessity to local law enforcement agencies located in or in part of the judicial district for the purposes of training law enforcement personnel in the investigation of offenses involving the use of a computer, electronic device, or the internet and in procuring tools and devices that assist in the investigation of offenses involving the use of a computer, electronic device, or the internet.

(3) Moneys in the special cybercrime fee law enforcement fund shall not be considered a source of revenue to meet a normal operating expense.

History. Acts 2017, No. 1109, § 1.

5-4-707. Additional term of imprisonment for offense constituting violence against church or other place of worship.

(a) As used in this section, “serious felony involving violence” means:

- (1) Murder in the first degree, § 5-10-102;
- (2) Murder in the second degree, § 5-10-103;
- (3) Battery in the first degree, § 5-13-201;
- (4) Aggravated assault, § 5-13-204;
- (5) Terroristic threatening, § 5-13-301, if a felony;
- (6) Terroristic act, § 5-13-310;
- (7) Causing a catastrophe, § 5-38-202(a);
- (8) Arson, § 5-38-301;
- (9) Terrorism, § 5-54-205;
- (10) A felony offense under § 5-54-201;
- (11) Unlawful discharge of a firearm from a vehicle, § 5-74-107;
- (12) Criminal use of prohibited weapons, § 5-73-104, involving an activity making it a Class B felony; or
- (13) A felony attempt, solicitation, or conspiracy to commit an offense listed in this subsection, if the attempt, solicitation, or conspiracy itself is a felony.

(b) A person is subject to an additional term of imprisonment under this section if the person:

(1) Purposely selected the victim of an offense committed by the person because the victim was present on the grounds of or in a church or other place of worship at the time of the offense; and

(2) Committed a serious felony involving violence against the victim.

(c) If an additional term of imprisonment is sought under this section, the information or indictment shall include:

(1) That the additional term of imprisonment under this section is being sought; and

(2) The allegations supporting the imposition of the additional term of imprisonment under this section.

(d) The additional term of imprisonment under this section is for a minimum of one (1) year but no more than ten (10) years in the Division of Correction.

(e) The additional term of imprisonment under this section is consecutive to any other sentence imposed.

(f) A person receiving an additional term of imprisonment under this section is not eligible for early release on parole or community correction transfer for the additional term of imprisonment.

History. Acts 2019, No. 1046, § 1.

SUBCHAPTER 8 — SENTENCING ALTERNATIVE — COMMUNITY SERVICE WORK

SECTION.

5-4-801. Definitions.

5-4-803. Procedure.

SECTION.

5-4-804. Medical treatment and costs.

Effective Dates. Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled ‘Funding and

classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-4-801. Definitions.

As used in this subchapter:

(1) “Community work project” means any program in which an eligible offender in a county jail is allowed to work under the supervision of a government entity on projects on public lands, public buildings, public roads, public parks, and public rights-of-way designed to benefit the government entity supervising the eligible offender;

(2) “Eligible offender” means any person convicted of a misdemeanor offense or felony offense other than:

- (A) Capital murder, § 5-10-101;
- (B) Murder in the first degree, § 5-10-102;
- (C) Murder in the second degree, § 5-10-103;
- (D) Manslaughter, § 5-10-104;
- (E) Rape, § 5-14-103;
- (F) Kidnapping, § 5-11-102;
- (G) Aggravated robbery, § 5-12-103;

(H) Driving or boating while intoxicated, second or subsequent offense, § 5-65-103;

- (I) Negligent homicide, § 5-10-105;
- (J) Trafficking a controlled substance, § 5-64-440;
- (K) Any felony involving violence as listed under § 5-4-501(d)(2);

or

(L) Any offense requiring registration under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.; and

(3) “Work incentive credit” means a sentence credit of up to three (3) days as designated by the court toward completion of an eligible offender’s sentence for each day the eligible offender works on a community work project.

History. Acts 2011, No. 570, § 21; 2015, No. 299, § 4.	Amendments. The 2015 amendment inserted “or boating” in (2)(H).
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RESEARCH REFERENCES

Ark. L. Rev. Mason L. Boling, Legislative Note: That Was the Easy Part: The Development of Arkansas’s Public Safety	Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact, 66 Ark. L. Rev. 1109 (2013).
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5-4-803. Procedure.

(a) A court may sentence an eligible offender under this subchapter.

(b)(1) If a court elects to sentence an eligible offender under this subchapter, the court may suspend imposition of sentence for the eligible offender for a period not to exceed the period of years that is the maximum penalty for the offense for which convicted upon condition that the eligible offender be incarcerated in a county jail or regional jail to participate in a community work project.

(2) In order for the eligible offender to participate in a community work project, space must be available in the county jail or regional jail as certified by the county sheriff to the:

(A) Division of Correction for an eligible offender committed to the division; or

(B) Court for an eligible offender serving time for a misdemeanor offense.

(3) The length of the community work project service and incarceration shall not exceed eighteen (18) months for a felony offense with work incentive credit or, in the case of a misdemeanor offense, the maximum length of incarceration for the misdemeanor offense reduced by the work incentive credit.

(c)(1) If an eligible offender sentenced under this subchapter withdraws consent to participate in a community work project, then:

(A) The county sheriff shall notify the court and bring the eligible offender before the court within a reasonable time; and

(B) The court shall determine whether the eligible offender has withdrawn consent to participate in a community work project.

(2) If the court finds that the eligible offender has withdrawn consent to participate in the community work project, the court shall remand

the eligible offender for the remaining portion of the eligible offender's sentence to the:

(A) Division for a felony offense; or

(B) County sheriff for a misdemeanor offense.

(3) If an eligible offender withdraws consent to participate in a community work project, the eligible offender is entitled to all good time and parole eligibility considerations as provided by law.

(4) Any portion of the sentence that was suspended by the court at the time of the original sentence is not affected by the removal of an eligible offender from participating in the community work project.

(d)(1) If an eligible offender's conduct while participating in a community work project is unsatisfactory, upon petition filed by the prosecuting attorney, the court may schedule a hearing to determine if the eligible offender should be allowed to continue to participate in the community work project.

(2) A hearing under this subsection shall follow the same format and accord the eligible offender the same safeguards as the revocation procedure in § 16-93-307.

(3) The burden of proof necessary for revocation of a sentence under this subchapter shall be a preponderance of the evidence that the eligible offender's conduct has been unsatisfactory while participating in a community work project.

(4) If the court finds that the eligible offender's conduct has been unsatisfactory while performing in a community work project, the court shall remand the eligible offender for the remaining portion of the eligible offender's sentence to the:

(A) Division for a felony offense; or

(B) County sheriff for a misdemeanor offense.

(5) If an eligible offender's conduct is found to be unsatisfactory, the eligible offender is entitled to all good time and parole eligibility considerations as provided by law.

History. Acts 2011, No. 570, § 21; substituted "Division of Correction" for 2013, No. 1125, § 3; 2019, No. 910, "Department of Correction" in (b)(2)(A), §§ 661-663. (c)(2)(A), and (d)(4)(A).

Amendments. The 2019 amendment

RESEARCH REFERENCES

Ark. L. Rev. Mason L. Boling, Legislative Note: That Was the Easy Part: The Development of Arkansas's Public Safety Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact, 66 Ark. L. Rev. 1109 (2013).

5-4-804. Medical treatment and costs.

The state is responsible for the cost of medical treatment approved by the Division of Correction of an eligible offender sentenced to a felony under this subchapter if the medical treatment is for:

- (1) The result of an injury sustained on the work site of the community work project or during transportation to and from the work site by a government entity; or
- (2)(A) The result of illness or an injury sustained by an eligible offender committed to the county jail or regional jail and who is assigned to a community work project.
- (B) The division may transfer an eligible offender committed to a county jail or regional jail under this subchapter to a medical facility or treatment facility, including a facility of the division, it deems appropriate for the medical treatment.
- (3) Nothing in this section precludes the division from seeking reimbursement or damages from a person or entity that contributes to or causes the injury or illness referred to in this section.

History. Acts 2011, No. 570, § 21; substituted “Division of Correction” for 2019, No. 910, § 664. “Department of Correction” throughout

Amendments. The 2019 amendment the section.

SUBCHAPTER 9 — SENTENCING ALTERNATIVE — PRE-ADJUDICATION
PROBATION

SECTION.	SECTION.
5-4-901. Legislative intent.	5-4-908. Program operation.
5-4-903. Program authorized.	5-4-912. Collection of data — Reporting requirement.
5-4-906. Record sealing upon completion.	5-4-913. Education screening.
5-4-907. Cost, fees, and restitution.	

Effective Dates. Acts 2019, No. 910, § 6346(b); July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled ‘Funding and

classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-4-901. Legislative intent.

The intent of this act is to provide the judiciary with an additional alternative to the disposition of criminal offenders that would assist the offender in atoning for his or her criminal transgression and promote the enforcement of the state’s criminal statutes while easing the inmate burden on the county jails and the Division of Correction.

History. Acts 2013, No. 1340, § 1; substituted “Division of Correction” for 2019, No. 910, § 665.

Amendments. The 2019 amendment

substituted “Division of Correction” for “Department of Correction”.

RESEARCH REFERENCES

Ark. L. Rev. Mason L. Boling, Legislative Note: That Was the Easy Part: The Development of Arkansas’s Public Safety Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact, 66 Ark. L. Rev. 1109 (2013).

5-4-903. Program authorized.

(a)(1) Each judicial district of this state may establish a pre-adjudication probation program under this subchapter.

(2) The structure, method, and operation of the pre-adjudication probation program may differ and shall be based upon the specific needs of and resources available to the judicial district where the pre-adjudication probation program is located.

(b)(1) A pre-adjudication probation program may incorporate services from various state agencies and educational institutions, including without limitation the Division of Community Correction, the Department of Human Services, the Adult Education Section, vocational schools, technical schools, community colleges, and two-year and four-year public universities.

(2) Participating state agencies and educational institutions may provide:

(A) Persons to serve as pre-adjudication probation officers, drug counselors, or other support staff;

(B) Drug testing and other substance-abuse facilities;

(C) Intensive short-term and long-term residential treatment for participants in the pre-adjudication probation program who have demonstrated a need for substance abuse treatment or other mental health-related treatment;

(D) Educational materials, classrooms, and staff; and

(E) Other personnel, support staff, or facilities that the circuit court administering the pre-adjudication probation program finds necessary or helpful.

(c) Subject to an appropriation, funding, and position authorization, both programmatic and administrative, the Administrative Office of the Courts shall:

(1) Provide state-level coordination and support for circuit courts administering the pre-adjudication probation program;

(2) Administer funds for the maintenance and operation of local pre-adjudication probation programs;

(3) Provide training and education to judges and other professionals involved in pre-adjudication probation programs; and

(4) Operate as a liaison between judges and other state-level agencies providing services to pre-adjudication probation programs.

History. Acts 2013, No. 1340, § 1; 2015, No. 1198, § 2; 2019, No. 910, § 1033.

Amendments. The 2015 amendment rewrote (b)(1); inserted “and educational institutions” in the introductory language of (b)(2); inserted (b)(2)(D); and redesignated former (b)(2)(D) as (b)(2)(E).

The 2019 amendment substituted “Division of Community Correction” for “Department of Community Correction” and “of the Division of Workforce Services” for “of the Department of Career Education” in (b)(1).

5-4-906. Record sealing upon completion.

(a) A pre-adjudication probation program judge, on his or her own motion or upon a request from the participant in the pre-adjudication probation program, shall order sealing and dismissal of a case if:

(1) The participant in the pre-adjudication probation program has successfully completed a pre-adjudication probation program, as determined by the pre-adjudication probation program judge;

(2) The pre-adjudication probation program judge has received a recommendation from the prosecuting attorney for sealing and dismissal of the case; and

(3) The pre-adjudication probation program judge, after considering the past criminal history of the participant in the pre-adjudication probation program, determines that sealing and dismissal of the case is appropriate.

(b) Unless otherwise ordered by the pre-adjudication probation program court, sealing under this section shall be as described in the Comprehensive Criminal Record Sealing Act of 2013, § 16-90-1401 et seq.

History. Acts 2013, No. 1340, § 1; 2015, No. 1155, § 3.

Amendments. The 2015 amendment substituted “sealing” for “expungement”

throughout the section; and substituted “the Comprehensive Criminal Record Sealing Act of 2013, § 16-90-1401 et seq.” for “§ 16-90-901 et seq. [repealed]” in (b).

5-4-907. Cost, fees, and restitution.

(a) The pre-adjudication probation program judge may order the offender to pay:

(1) Court costs as provided in § 16-10-305;

(2) Any substance abuse treatment costs;

(3) Drug testing costs;

(4) Costs associated with mental health treatment;

(5) A pre-adjudication probation program user fee;

(6) Any restitution owed the victim of the charged criminal offense;

(7) Necessary supervision fees;

(8) Any applicable residential treatment fees;

(9) Tuition and other educational fees for vocational schools, technical schools, community colleges, or two-year and four-year public universities that are part of the pre-adjudication probation program for which the offender is participating; and

(10) Any fees determined or authorized under § 12-27-125(b)(17)(B) or § 16-93-104(a)(1), which are to be paid to the Division of Community Correction.

(b)(1) The pre-adjudication probation program judge shall establish a schedule for the payment of costs, fees, and restitution.

(2) The cost for substance abuse treatment, mental health treatment, drug testing, and supervision shall be set by the treatment and supervision providers respectively and made part of the order of the pre-adjudication probation program judge for payment.

(3) Pre-adjudication probation program user fees shall be set by the pre-adjudication probation program judge.

(4) Treatment, drug testing, and supervision costs or fees shall be paid to the respective providers.

(5) Fees determined or authorized under § 12-27-125(b)(17)(B) or § 16-93-104(a)(1) shall be paid to the division.

(6) Restitution to the victim shall be paid directly to the victim.

(c) Court orders for costs, fees, and restitution shall remain an obligation of the participant in the pre-adjudication probation program with court monitoring until fully paid.

History. Acts 2013, No. 1340, § 1; inserted present (a)(9), and redesignated 2015, No. 1198, § 3. former (a)(9) as (a)(10).

Amendments. The 2015 amendment

5-4-908. Program operation.

(a)(1) A pre-adjudication probation program may require a separate judicial processing system differing in practice and design from the traditional adversarial criminal prosecution and trial systems.

(2) A pre-adjudication probation program team shall be designated by a circuit judge assigned to manage the pre-adjudication probation program docket and may include a circuit judge, a prosecuting attorney, a public defender or private defense attorney, one (1) or more probation officers, and any other individual or individuals determined necessary by the pre-adjudication probation program judge.

(3)(A) The administrative judge of the judicial district shall designate one (1) or more circuit judges to administer the pre-adjudication probation program.

(B) If a county is in a judicial district that does not have a circuit judge who is able to administer the pre-adjudication probation program on a consistent basis, the administrative plan for the judicial circuit required by Supreme Court Administrative Order No. 14 may designate a state district court judge to administer the pre-adjudication probation program.

(b) Each judicial district may develop a training and implementation manual for a pre-adjudication probation program with the assistance of:

- (1) The Department of Human Services;
- (2) The Division of Elementary and Secondary Education;
- (3) The Adult Education Section;

- (4) The Division of Community Correction;
- (5) The Administrative Office of the Courts; and
- (6) Any vocational school, technical school, community college, or two-year and four-year public university that has volunteered to be part of the pre-adjudication program in the judicial district.

History. Acts 2013, No. 1340, § 1; 2015, No. 1198, § 4; 2019, No. 910, § 134.

Amendments. The 2015 amendment deleted “the” at the end of the introductory language of (b); added “The” in (b)(1) through (b)(5); and added (b)(6).

The 2019 amendment substituted “Division of Elementary and Secondary Edu-

cation” for “Department of Education” in (b)(2); substituted “Adult Education Section” for “Department of Career Education” in (b)(3); and substituted “Division of Community Correction” for “Department of Community Correction” in (b)(4).

5-4-912. Collection of data — Reporting requirement.

(a)(1) A pre-adjudication probation program shall collect and provide data on pre-adjudication probation program applicants and all participants as required by the Administrative Office of the Courts.

(2) Data collected under subdivision (a)(1) of this section shall include:

- (A) The total number of applicants;
- (B) The total number of participants;
- (C) The total number of successful applicants;
- (D) The total number of successful participants;
- (E) The reason why each unsuccessful participant did not complete the pre-adjudication probation program;
- (F) Information about what happened to each unsuccessful participant;
- (G) The total number of participants who were arrested for a new criminal offense while in the pre-adjudication probation program;
- (H) The total number of participants who were convicted of a new criminal offense while in the pre-adjudication probation program;
- (I) The total number of participants who committed a violation of one (1) or more conditions of the pre-adjudication probation program and the resulting sanction;
- (J) The results of the initial risk-needs assessment review for each participant;
- (K) The race and gender of each applicant;
- (L) The race and gender of each participant;
- (M) The race and gender of each victim of an offense committed by the applicant;
- (N) The race and gender of each victim of an offense committed by the participant; and
- (O) Any other data or information as required by the office.

(b) The data collected for evaluation purposes under subsection (a) of this section shall:

- (1) Include a minimum standard data set developed and specified by the office; and

(2) Be maintained in the court files or be otherwise accessible by the courts and the office.

(c)(1) After an individual is discharged either upon completion or termination of a pre-adjudication probation program, the pre-adjudication probation program as far as is practicable shall conduct follow-up contacts with and reviews of former pre-adjudication probation program participants for key outcome indicators of drug use, recidivism, and employment.

(2)(A) The follow-up contacts with and reviews of former pre-adjudication probation program participants shall be conducted as frequently and for a period of time as determined by the office based upon the nature of the pre-adjudication probation program and the nature of the participants.

(B) The follow-up contacts with and reviews of former pre-adjudication probation program participants are not extensions of the pre-adjudication probation program court's jurisdiction over the pre-adjudication probation program participants.

(d) For purposes of standardized measurement of success of pre-adjudication probation programs across the state, the office in consultation with other state agencies shall adopt an operational definition of terms to be used in any evaluation and report of pre-adjudication probation programs such as:

- (1) "Incentives given";
- (2) "Recidivism";
- (3) "Retention";
- (4) "Relapses";
- (5) "Restarts"; and
- (6) "Sanctions imposed".

(e) Each pre-adjudication probation program shall provide all information requested by the office.

(f) The office, the Division of Community Correction, the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services, and the Arkansas Crime Information Center shall work together to share and make available data to provide a comprehensive data management system for the state's pre-adjudication probation programs.

(g)(1) The office shall:

(A) Develop a statewide evaluation model for pre-adjudication probation programs; and

(B) Conduct ongoing evaluations of the effectiveness and efficiency of all pre-adjudication probation programs.

(2) The office shall submit to the General Assembly by July 1 of each year a report of the evaluations under subdivision (g)(1) of this section.

History. Acts 2013, No. 1340, § 1; 2017, No. 913, § 15.

Amendments. The 2017 amendment substituted "Division of Aging, Adult, and

Behavioral Health Services of the Department of Human Services" for "Division of Behavioral Health Services" in (f).

5-4-913. Education screening.

A person eligible to enter a pre-adjudication program under this subchapter shall have his or her education level assessed by the court by completing a reading, literacy, and math assessment by the Adult Education Section.

History. Acts 2015, No. 1198, § 5; substituted “Adult Education Section” for 2019, No. 910, § 1034. “Department of Career Education”.

Amendments. The 2019 amendment

CHAPTER 5
DISPOSITION OF CONTRABAND AND SEIZED
PROPERTY

SUBCHAPTER.

- 2. FORFEITURE OF CONVEYANCES USED IN COMMISSION OF CERTAIN CRIMES.
- 5. IMPOUNDMENT OF MOTOR VEHICLE DUE TO PROSTITUTION OFFENSE.

SUBCHAPTER 2 — FORFEITURE OF CONVEYANCES USED IN COMMISSION OF
CERTAIN CRIMES

SECTION.

5-5-201. Forfeiture requirement — Ex-
ceptions.

SECTION.

5-5-202. Seizure of conveyances.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev.

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Trafficking Laws: Steps in the Right Di-

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(2014).

5-5-201. Forfeiture requirement — Exceptions.

(a) Upon conviction, any conveyance, including an aircraft, motor vehicle, or vessel, is subject to forfeiture under this subchapter if it is used in the commission or attempt of:

- (1) A burglary;
 - (2) A robbery;
 - (3) A theft;
 - (4) An arson; or
 - (5) Trafficking of persons, § 5-18-103.
- (b) However:

(1) A conveyance used by any person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture under this subchapter unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to the commission or attempt to commit the offense;

(2) A conveyance is not subject to forfeiture under this subchapter by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent and without the knowledge or consent of any person having possession, care, or control of the conveyance with the owner's permission; and

(3) A forfeiture of a conveyance encumbered by a security interest is subject to the security interest of the secured party if the secured party neither had knowledge of nor consented to the use of the conveyance in the commission or attempt to commit the offense.

(c)(1) A person who uses or possesses one (1) or more of the following items or conveyances in the commission of a second or subsequent offense for criminal trespass, § 5-39-203, or criminal trespass on premises located in an unincorporated area, § 5-39-305, that occurs within five (5) years of a prior offense of criminal trespass, § 5-39-203, or criminal trespass on premises located in an unincorporated area, § 5-39-305, is subject to that item's or conveyance's being seized and forfeited under this subchapter:

- (A) An all-terrain vehicle, as defined under § 27-21-102;
- (B) A conveyance, including an aircraft, motor vehicle, or vessel;
- (C) A harvesting device, as defined under § 5-39-101;
- (D) A killing device, as defined under § 5-39-101; or
- (E) A tool or other implement.

(2) A person or entity that has a valid security interest in an item or conveyance subject to seizure and forfeiture under this subsection is entitled to notice of any forfeiture proceeding as well as the right to intervene in the forfeiture proceeding in order to secure and represent the person's or entity's interest in the item or conveyance to be forfeited.

History. Acts 1985, No. 238, § 1; A.S.A. 1947, § 41-1403; Acts 2013, No. 1157, § 2; 2013, No. 1363, § 1; 2017, No. 877, § 1.

Amendments. The 2017 amendment, in (b)(1), substituted "A conveyance" for "No conveyance" and substituted "is not subject to" for "is subject to"; substituted "A conveyance is not" for "No conveyance is" in (b)(2); and rewrote (c).

5-5-202. Seizure of conveyances.

(a) A conveyance subject to forfeiture under this subchapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the conveyance upon a petition filed by the prosecuting attorney of the judicial district.

(b) Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant; or

(2) Any law enforcement officer has probable cause to believe that the conveyance was used in the commission or attempt of:

- (A) A burglary;
- (B) A robbery;
- (C) A theft;
- (D) An arson; or

(E) Trafficking of persons, § 5-18-103.

History. Acts 1985, No. 238, § 2; A.S.A. 1947, § 41-1404; Acts 2013, No. 1157, § 3; 2015, No. 1155, § 4. **Amendments.** The 2015 amendment substituted “officer” for “agent” in (b)(2).

SUBCHAPTER 5 — IMPOUNDMENT OF MOTOR VEHICLE DUE TO PROSTITUTION OFFENSE

SECTION.

5-5-501. Motor vehicle impoundment.

5-5-501. Motor vehicle impoundment.

(a) An arresting law enforcement officer may impound the motor vehicle of a person arrested if:

- (1) The motor vehicle was used in the commission of an offense under § 5-70-101 et seq. by the person arrested;
- (2) The person arrested is the owner of the motor vehicle or the motor vehicle is being rented and the person arrested is the lessee; and
- (3) Either:

(A) The person arrested has previously been convicted of an offense under § 5-70-101 et seq.; or

(B) An ordinance under subsection (b) of this section is in effect and the offense was committed within an area designated under subsection (b) of this section.

(b)(1) A local government may designate by ordinance an area within which a motor vehicle is subject to impoundment if a person using a motor vehicle is arrested for an offense under § 5-70-101 et seq.

(2) The designation must be based on evidence indicating that the area has a disproportionately higher number of arrests for an offense under § 5-70-101 et seq. as compared to other areas within the same jurisdiction.

(3) The local government shall post signs at the boundaries of the area to indicate that the area has been designated under this subsection.

(c)(1) An impoundment of a motor vehicle under this section shall be in accordance with state law, and the impoundment shall be indicated as a “prostitution hold”.

(2)(A) Before redeeming the impounded motor vehicle, and in addition to all applicable impoundment, towing, and storage fees paid to the towing company as provided by law, an owner of an impounded motor vehicle shall pay an impoundment fee of five hundred dollars (\$500) to the impounding law enforcement agency.

(B)(i) Upon receipt of the impoundment fee paid under subdivision (c)(2)(A) of this section, the impounding law enforcement agency shall issue a written receipt to the owner of the impounded motor vehicle, which the owner shall provide to the towing company.

(ii) The written receipt issued under subdivision (c)(2)(B)(i) of this section authorizes the towing company to release the impounded

motor vehicle upon payment of all impoundment, towing, and storage fees.

(iii) A towing company that relies on a forged receipt to release a motor vehicle impounded under this section is not liable to the impounding law enforcement agency for any unpaid impoundment fee under this subsection.

(d) An impoundment fee assessed under this section shall be collected by the impounding law enforcement agency and remitted to the Human Trafficking Victim Support Fund on the first business day of each month.

(e)(1) In a legal proceeding to contest the validity of an impoundment under this section in which the person substantially prevails, in which the person is found not guilty at trial for the offense or offenses for which the motor vehicle was impounded, or in which the charges for which the motor vehicle was impounded are dismissed, the person is entitled to a full refund of the impoundment, towing, and storage fees paid and the impounding fee paid under subsection (c) of this section.

(2) A refund made under this subsection shall be paid by the impounding law enforcement agency.

(3) Before receiving a refund under this subsection, the person must provide proof of payment of the fee for which he or she is claiming a refund.

History. Acts 2017, No. 765, § 1.

SUBTITLE 2. OFFENSES AGAINST THE PERSON

CHAPTER 10

HOMICIDE

SECTION.

5-10-101. Capital murder.

5-10-102. Murder in the first degree.

5-10-106. Physician-assisted suicide.

SECTION.

5-10-107. Encouraging the suicide of another person.

Effective Dates. Acts 2017, No. 539, § 14: Mar. 20, 2017. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in light of recent United States Supreme Court decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, more than one hundred persons in Arkansas are entitled to relief under those decisions; and that this act is immediately necessary in order to make those persons eligible for parole in order to be in compliance with *Montgomery v. Louisiana*. Therefore, an emergency is declared to

exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: "It is found and determined by the General As-

sembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncoded sections of this act preceding the emergency clause titled ‘Funding and classification of cabinet-level department secretaries’ and ‘Transformation and

Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

RESEARCH REFERENCES

ALR. Application of Defense of Necessity to Murder, 23 A.L.R.7th Art. 1 (2018).
Comment Note: Criminal Liability for

Death Resulting from Unlawfully Furnishing Intoxicating Liquor or Drugs to Another, 29 A.L.R.7th Art. 8 (2018).

5-10-101. Capital murder.

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit:

(i) Terrorism, as defined in § 5-54-205;

(ii) Rape, § 5-14-103;

(iii) Kidnapping, § 5-11-102;

(iv) Vehicular piracy, § 5-11-105;

(v) Robbery, § 5-12-102;

(vi) Aggravated robbery, § 5-12-103;

(vii) Residential burglary, § 5-39-201(a);

(viii) Commercial burglary, § 5-39-201(b);

(ix) Aggravated residential burglary, § 5-39-204;

(x) A felony violation of the Uniform Controlled Substances Act, §§ 5-64-101 — 5-64-508, involving an actual delivery of a controlled substance; or

(xi) First degree escape, § 5-54-110; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of a person under circumstances manifesting extreme indifference to the value of human life;

(2) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit arson, § 5-38-301; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person;

(3) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, any military

personnel, or teacher or school employee, when such person is acting in the line of duty, the person causes the death of any person;

(4) With the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person;

(5) With the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or appointment or a candidate for public office, the person causes the death of any person;

(6) While incarcerated in the Division of Correction or the Division of Community Correction, the person purposely causes the death of another person after premeditation and deliberation;

(7) Pursuant to an agreement that the person cause the death of another person in return for anything of value, he or she causes the death of any person;

(8) The person enters into an agreement in which a person is to cause the death of another person in return for anything of value, and a person hired pursuant to the agreement causes the death of any person;

(9)(A) Under circumstances manifesting extreme indifference to the value of human life, the person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed if the defendant was eighteen (18) years of age or older at the time the murder was committed.

(B) It is an affirmative defense to any prosecution under this subdivision (a)(9) arising from the failure of the parent, guardian, or person standing in loco parentis to provide specified medical or surgical treatment, that the parent, guardian, or person standing in loco parentis relied solely on spiritual treatment through prayer in accordance with the tenets and practices of an established church or religious denomination of which he or she is a member; or

(10) The person:

(A) Purposely discharges a firearm from a vehicle at a person or at a vehicle, conveyance, or a residential or commercial occupiable structure that he or she knows or has good reason to believe to be occupied by a person; and

(B) Thereby causes the death of another person under circumstances manifesting extreme indifference to the value of human life.

(b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in the homicidal act's commission.

(c)(1) Capital murder is punishable as follows:

(A) If the defendant was eighteen (18) years of age or older at the time he or she committed the capital murder:

(i) Death; or

(ii) Life imprisonment without parole under §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608; or

(B) If the defendant was younger than eighteen (18) years of age at the time he or she committed the capital murder, life imprisonment

with the possibility of parole after serving a minimum of thirty (30) years' imprisonment.

(2) For any purpose other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-307, 5-4-401 — 5-4-404, 5-4-501 — 5-4-504, 5-4-601 — 5-4-605, 5-4-607, 5-4-608, 16-93-307, 16-93-313, and 16-93-314, capital murder is a Class Y felony.

History. Acts 1975, No. 280, § 1501; 1983, No. 341, § 1; 1985, No. 840, § 1; A.S.A. 1947, § 41-1501; Acts 1987, No. 242, § 2; 1989, No. 97, § 1; 1989, No. 856, § 1; 1991, No. 683, § 1; 1993, No. 1189, § 2; 1995, No. 258, § 1; 1995, No. 800, § 1; 2003, No. 1342, § 5; 2007, No. 827, §§ 19, 20; 2009, No. 748, § 6; 2009, No. 1395, § 3; 2011, No. 570, § 22; 2013, No. 1490, § 3; 2017, No. 539, § 6; 2019, No. 910, § 666.

A.C.R.C. Notes. Acts 2017, No. 539, § 1, provided: "Title. This act shall be known and may be cited as the 'Fair Sentencing of Minors Act of 2017'."

Acts 2017, No. 539, § 2, provided: "Legislative intent.

"(a)(1) The General Assembly acknowledges and recognizes that minors are constitutionally different from adults and that these differences must be taken into account when minors are sentenced for adult crimes.

"(2) As the United States Supreme Court quoted in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control'.

"(3) Minors are more vulnerable to negative influences and outside pressures, including from their family and peers, and they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

"(4) The United States Supreme Court has emphasized through its cases in *Miller*, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), that 'the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes'.

"(5) Youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society.

"(b) In the wake of these United States Supreme Court decisions and the emerging juvenile brain and behavioral development science, several states, including Texas, Utah, South Dakota, Wyoming, Nevada, Iowa, Kansas, Kentucky, Montana, Alaska, West Virginia, Colorado, Hawaii, Delaware, Connecticut, Vermont, Massachusetts, and the District of Columbia, have eliminated the sentence of life without parole for minors.

"(c) It is the intent of the General Assembly to eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing standards in compliance with the United States Constitution for minors who commit serious crimes."

Amendments. The 2017 amendment deleted former (c)(1)(B)(i) and the former (c)(1)(B)(ii) designation; and substituted "thirty (30)" for "twenty-eight (28)" in (c)(1)(B).

The 2019 amendment substituted "Division of Correction" for "Department of Correction" and "Division of Community Correction" for "Department of Community Correction" in (a)(6).

CASE NOTES

ANALYSIS

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Applicability.

Legislature did not intend for the penalty provisions of the Fair Sentencing of Minors Act of 2017 (FSMA), codified at § 5-4-104(b) and § 5-10-101(c), to apply retroactively where the FSMA contained no general retroactivity provision, no retroactivity provision was attached to the FSMA's penalty provisions, and the legislature had expressly stated its intent that other sections of the FSMA applied retroactively. Therefore, the revised punishment for juveniles convicted of capital murder applies only to crimes committed on or after March 20, 2017, the effective date of the FSMA. *Harris v. State*, 2018 Ark. 179 (2018).

Parole-eligibility provision of the Fair Sentencing of Minors Act of 2017 (FSMA), codified at § 16-93-621(a)(2), did not apply at the time of defendant's hearing because the provision, by its plain language, applies only to those juvenile offenders who are serving a sentence for either capital or first-degree murder; because defendant's life-without-parole sentence was vacated in 2016 under *Jackson v. Norris*, 2013 Ark. 175, and *Kelly v. Gordon*, 2015 Ark. 277, he was no longer serving a sentence to which parole eligibility could attach. *Harris v. State*, 2018 Ark. 179 (2018).

Because the relevant provisions of the Fair Sentencing of Minors Act of 2017 were inapplicable to defendant, defendant was entitled to a hearing under *Jackson v. Norris*, 2013 Ark. 175, to present *Miller* evidence for consideration and sentencing within the discretionary range for a Class Y felony. *Harris v. State*, 2018 Ark. 179 (2018).

In accord with *Harris v. State*, 2018 Ark. 179. *Robinson v. State*, 2018 Ark. 353, 563 S.W.3d 530 (2018); *Howell v. State*, 2019 Ark. 59, 567 S.W.3d 842 (2019); *Elliott v. State*, 2019 Ark. 162 (2019).

Accomplice.

Evidence was sufficient to support convictions for aggravated robbery and capital murder because defendant's intent was inferred from the actions of his accomplice; defendant's statement to police provided direct evidence of the accomplice's intent to commit an aggravated robbery, and his account of how the accomplice murdered the victim by shooting her in the forehead was substantial evidence of causing the death of a person under circumstances manifesting extreme indifference to the value of human life. There was ample proof of defendant's participation as he accompanied others to the victim's residence, persuaded her to open the door, helped search the residence, and collected and kept his own share of the property that was stolen. *Conway v. State*, 2016 Ark. 7, 479 S.W.3d 1 (2016).

There was sufficient evidence that defendant was an accomplice to the crimes of aggravated robbery and capital murder as defendant admitted that he and the codefendants sat in a car planning the theft of beer from a gas station and convenience store and surveillance videos showed that defendant and a codefendant rushed into the store together, that codefendant shot the store clerk, and that defendant attempted to open the cash register, appeared to look around for something to steal, and searched the victim's pockets before fleeing. *Williams v. State*, 2017 Ark. 287, 528 S.W.3d 839 (2017).

Even assuming the witness was an accomplice, there was independent evidence tending to connect defendant with attempted capital murder, unlawful discharge of a firearm from a vehicle, and fleeing, as his letters and call to the witness were consistent with testimony that defendant was the shooter, and the jury could have found that defendant's alleged actions in firing the assault rifle at the officer and telling the driver to go aided and encouraged the driver in fleeing from the officer. *Farmer v. State*, 2019 Ark. App. 331 (2019).

Assistance of Counsel.

Trial court did not clearly err when it found that appellant's guilty plea was voluntarily and intelligently entered because trial counsel was not ineffective for allegedly pressuring appellant into pleading guilty to avoid the death penalty; although appellant argued that the prosecutor had not filed notice of intent to seek the death penalty, the circumstances surrounding the death of the victim and her unborn child supported trial counsel's reasonable belief that appellant faced a potential death sentence. *True v. State*, 2017 Ark. 323, 532 S.W.3d 70 (2017).

Burden of Proof.

To establish the requisite mens rea for capital murder, the State had prove that defendant had the conscious object to cause the victim's death, that such an intention was formed before he acted, and that he weighed in his mind the consequences of his course of conduct. *Thornton v. State*, 2014 Ark. 157, 433 S.W.3d 216 (2014).

Evidence.

Where defendant appealed his conviction for capital murder in furtherance of aggravated robbery, there was substantial evidence to support the finding that the murder was committed during the course and furtherance of an aggravated robbery. Whatever contradictions, conflicts, and inconsistencies there were in the passenger's testimony were for the jury to resolve, and it could credit those parts of his testimony it believed to be true and disregard those it believed to be false. *Wells v. State*, 2013 Ark. 389, 430 S.W.3d 65 (2013).

Court did not err in denying defendant's motions for a directed verdict on capital-murder charges, in violation of subdivision (a)(4) of this section, because evidence was offered to establish his relationship with the victims, evidence was offered that he always carried a knife and pistol, and evidence was offered of his attempt to conceal the crimes and to manufacture an alibi. *Green v. State*, 2013 Ark. 497, 430 S.W.3d 729 (2013).

Evidence was sufficient to sustain defendant's attempted capital murder convictions because, after shooting the officer in the shoulder, defendant fired five additional shots at the fleeing officers; the

officer's pat-down of defendant showed that he was unarmed, but he had the wherewithal to run into the apartment and retrieve his gun. *Inthisone v. State*, 2013 Ark. App. 482 (2013).

Testimony that defendant was the last person with the victim, that defendant told four people that morning that he had killed someone, and that defendant confessed to someone he had used a rock to commit the murder, which had been committed with a piece of concrete, was sufficient to support defendant's capital murder conviction. *Watson v. State*, 2014 Ark. 203, 444 S.W.3d 835 (2014).

Sufficient evidence showed defendant's capital murder of a victim, under subdivision (a)(4) of this section, because (1) testimony put defendant where the victim's body was found, (2) the victim's blood was found in the vehicle defendant drove, which reeked of gasoline for which the victim's clothing tested positive, (3) defendant's DNA was found in the victim's vagina, and (4) defendant confessed. *Brooks v. State*, 2016 Ark. 305, 498 S.W.3d 292 (2016).

It was not error to deny defendant's directed verdict motion on capital murder because substantial evidence supported finding defendant murdered the victim, as (1) the victim was having an affair with defendant's husband, (2) defendant confronted the victim, (3) defendant owned the type of gun used to kill the victim, (4) a shirt testing positive for gunshot residue was found on defendant's bed, (5) defendant was at the crime scene at the time of the murder, (6) defendant lied about her whereabouts, (7) defendant's demeanor changed greatly after the murder, and (8) defendant's conduct after the shooting showed a consciousness of guilt. *Hyatt v. State*, 2018 Ark. 85, 540 S.W.3d 673 (2018).

Trial court did not err in denying defendant's motions for a directed verdict because substantial evidence supported the jury's verdict that he was guilty of capital murder; four witnesses, two of whom were defendant's own children, testified that he shot the victim, and the eyewitness testimony was consistent with the testimony of the medical examiner. *Fletcher v. State*, 2018 Ark. 261, 555 S.W.3d 858 (2018).

While the State's case against defendant for capital felony murder/aggravated robbery was premised on circumstantial

evidence, testimony clearly corroborated an accomplice's testimony against defendant and the evidence was sufficient to support the jury's verdict even without the accomplice testimony; testimony from multiple witnesses demonstrated that three masked men entered a gas station convenience store, the man in red demanded money from the owner, shot him in the neck, and then turned his gun on an employee, shooting him in the face. *Law-shea v. State*, 2019 Ark. 68, 567 S.W.3d 853 (2019).

Circuit court properly sentenced defendant for capital murder, unlawful discharge of a firearm from a vehicle, terroristic act, and employing a firearm in the commission of a felony although a witness testified that he shot the victim rather than the defendant and the State's firearms expert was unable to link the bullet recovered from the victim's body to the alleged murder weapon. The jury was free to believe the testimony of two other witnesses and disbelieve the confessing witness and nothing in the capital-murder statute required the State to prove anything regarding the weapon alleged to have been used. *Martinez v. State*, 2019 Ark. 85, 569 S.W.3d 333 (2019).

Defendant convicted of capital murder and terroristic act was not prejudiced by the hearsay testimony of a detective regarding a witness's statements to the detective and the circuit court's failure to give the limiting instruction because substantially similar testimony by another witness was admitted without objection. *Martinez v. State*, 2019 Ark. 85, 569 S.W.3d 333 (2019).

—Attempted Capital Murder.

There was sufficient evidence to convict defendant of attempted capital murder, where the evidence showed defendant threatened to kill the victim and made the conscious decision to attack him with a semiautomatic gun, but the weapon jammed when defendant pointed it at the victim in order to shoot and kill him, and the victim escaped before defendant could attempt to fire again. *Hill v. State*, 2015 Ark. App. 700, 478 S.W.3d 225 (2015).

Instructions.

Where defendant appealed his conviction for capital murder in furtherance of aggravated robbery, even if there were

any evidence to support the giving of an accomplice witness instruction, defendant had not shown that he was prejudiced by the circuit court's failure to give the instruction because the passenger's testimony was sufficiently corroborated by other evidence. *Wells v. State*, 2013 Ark. 389, 430 S.W.3d 65 (2013).

Jurisdiction.

Where defendant was tried on alternate theories of capital murder—rape felony murder and child-abuse murder—and a general verdict form was used, and extraterritorial jurisdiction did not extend to the alleged rape that occurred in Missouri, the appellate court was unable to determine which theory the jury based the conviction on and therefore the conviction was reversed. Although death was the consequence or result of the rape, rape is not defined to include death as a consequence, and thus, under the plain language of § 5-1-104, extraterritorial jurisdiction did not extend to the alleged rape that occurred in Missouri. *Torres v. State*, 2019 Ark. 101, 571 S.W.3d 456 (2019).

Premeditation and Deliberation.

Because the circuit court engaged in speculation in determining that defendant acted with premeditation and deliberation and improperly shifted the burden of proof to him when weighing the evidence, the court reversed defendant's conviction for capital murder; there was no evidence of close-range fire, there could have been multiple scenarios explaining the trajectory of the bullet, and there was no evidence that defendant picked up a gun, walked up behind the victim, and shot him in the head. *Thornton v. State*, 2014 Ark. 157, 433 S.W.3d 216 (2014).

Petitioner was not entitled to a writ of error coram nobis because there was no reasonable probability that evidence allegedly suppressed would have resulted in a conviction of a lesser-included offense of capital murder; a witness's statement recanting her testimony that the victim was unarmed did not establish that his murder was justified or refute evidence that petitioner acted with premeditation and deliberation when he shot the victim multiple times in the back and at close range. *Stenhouse v. State*, 2016 Ark. 295, 497 S.W.3d 679 (2016), cert. denied, — U.S. —, 137 S. Ct. 837, 197 L. Ed. 2d 75 (2017).

Substantial evidence supported a jury's finding that defendant acted with premeditation and deliberation in killing a victim because (1) the victim sustained numerous injuries to the victim's face and head caused by separate blows, (2) the number and nature of wounds showed a prolonged and violent struggle, and (3) the victim was strangled, all showing defendant's conscious object to cause the victim's death. *Brooks v. State*, 2016 Ark. 305, 498 S.W.3d 292 (2016).

Substantial evidence supported a jury's finding that defendant acted with premeditation and deliberation when committing capital murder because it was possible for the jury to have found that, after having time to cool off after her husband left her, defendant drove to the victim's house with a gun and shot the victim five times. *Hyatt v. State*, 2018 Ark. 85, 540 S.W.3d 673 (2018).

Preservation for Review.

Difference between the elements of capital murder and first-degree murder under the particular subsections of the statutes at issue is in terms of specificity; the capital-murder statute contains a list of specific felonies the defendant must have committed—here, aggravated robbery, whereas the first-degree murder statute simply requires a death to have occurred during the commission of “a felony”. *Jackson v. State*, 2018 Ark. App. 330, 552 S.W.3d 55 (2018).

Defendant's challenge to the sufficiency of the evidence supporting his conviction as an accomplice to first-degree murder was preserved; although defense counsel did not mention “first-degree murder” in his directed-verdict motion, considering the subsections of the statutes on which the jury was instructed, the elements of capital murder and first-degree murder were the same. *Jackson v. State*, 2018 Ark. App. 330, 552 S.W.3d 55 (2018).

Sentence.

Habeas relief was not warranted because an applicant was charged under a former first-degree murder statute where a murder was committed in the course of a robbery, and he was properly sentenced to life imprisonment without parole on his plea of guilty to capital-felony murder. An argument that murder in the first degree and capital murder were separate offenses with a separate penalty was rejected. [Decided under former section] *Gooch v. Hobbs*, 2014 Ark. 73 (2014).

Because the evidence was sufficient to establish the premeditation and deliberation required to convict defendant of capital murder, and because the sentence he received was provided for by statute, the trial court did not exceed its authority in sentencing defendant to life imprisonment without parole. *Fletcher v. State*, 2018 Ark. 261, 555 S.W.3d 858 (2018).

In accord with *Harris v. State*, 2018 Ark. 179. Circuit court erred in applying the Fair Sentencing of Minors Act of 2017 (FSMA) to defendant juvenile's case because defendant committed his crime before the effective date of the FSMA, and thus, the penalty provisions did not apply; because defendant's sentence was vacated, he was no longer serving a sentence to which parole eligibility could attach, and thus, the parole-eligibility provision of the FSMA did not apply at the time of his hearing on the State's motion for resentencing. *Ray v. State*, 2019 Ark. 46, 567 S.W.3d 63 (2019).

Underlying Felony.

Substantial evidence supported defendant's capital murder conviction under this section, as there was sufficient evidence that defendant committed the underlying felony of attempted robbery under §§ 5-3-201(a)(2), 5-12-102; defendant approached the victim with a weapon, demanded his phone, and pointed the weapon at the victim at point-blank range. *Hicks v. State*, 2017 Ark. 262, 526 S.W.3d 831 (2017).

5-10-102. Murder in the first degree.

- (a) A person commits murder in the first degree if:
 - (1) Acting alone or with one (1) or more other persons:
 - (A) The person commits or attempts to commit a felony; and
 - (B) In the course of and in the furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes

the death of any person under circumstances manifesting extreme indifference to the value of human life;

(2) With a purpose of causing the death of another person, the person causes the death of another person; or

(3) The person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed.

(b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant:

(1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid the homicidal act's commission;

(2) Was not armed with a deadly weapon;

(3) Reasonably believed that no other participant was armed with a deadly weapon; and

(4) Reasonably believed that no other participant intended to engage in conduct that could result in death or serious physical injury.

(c)(1) Murder in the first degree is a Class Y felony.

(2) Unless the application of § 16-93-621 results in a person's being eligible for parole at an earlier date, if a person was younger than eighteen (18) years of age at the time he or she committed murder in the first degree and is sentenced to life imprisonment, the person is eligible for parole after serving a minimum of twenty-five (25) years' imprisonment.

History. Acts 1975, No. 280, § 1502; 1981, No. 620, § 10; A.S.A. 1947, § 41-1502; Acts 1987 (1st Ex. Sess.), No. 52, § 1; 1989, No. 856, § 2; 1991, No. 683, § 2; 2017, No. 539, § 7.

A.C.R.C. Notes. Acts 2017, No. 539, § 1, provided: "Title. This act shall be known and may be cited as the 'Fair Sentencing of Minors Act of 2017'."

Acts 2017, No. 539, § 2, provided: "Legislative intent.

"(a)(1) The General Assembly acknowledges and recognizes that minors are constitutionally different from adults and that these differences must be taken into account when minors are sentenced for adult crimes.

"(2) As the United States Supreme Court quoted in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control'.

"(3) Minors are more vulnerable to negative influences and outside pressures,

including from their family and peers, and they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

"(4) The United States Supreme Court has emphasized through its cases in *Miller*, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), that 'the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes'.

"(5) Youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society.

"(b) In the wake of these United States Supreme Court decisions and the emerging juvenile brain and behavioral development science, several states, including Texas, Utah, South Dakota, Wyoming, Nevada, Iowa, Kansas, Kentucky, Montana, Alaska, West Virginia, Colorado, Hawaii, Delaware, Connecticut, Vermont, Massachusetts, and the District of Columbia,

have eliminated the sentence of life without parole for minors.

“(c) It is the intent of the General Assembly to eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing

standards in compliance with the United States Constitution for minors who commit serious crimes.”

Amendments. The 2017 amendment redesignated former (c) as (c)(1); and added (c)(2).

CASE NOTES

ANALYSIS

Accomplice.

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Accomplice.

Substantial evidence supported appellant's first-degree murder conviction on an accomplice theory where the multiple phone calls between appellant and his brother, who was accused of shooting the two victims, and witness testimony that appellant and the brother discussed a pistol-whipping incident supported the jury's findings of guilt. *Taylor v. State*, 2017 Ark. App. 331 (2017).

Substantial evidence supported defendant's convictions as an accomplice to first-degree murder and aggravated robbery. Defendant was in the proximity of the crime; a video put defendant inside the victim's home shortly before the video tended to establish the victim had been killed; and he had the opportunity to aid in the commission of the crime in that he returned quickly to the residence after the other party entered, using his shirt to open the door, and subsequently ran from the house carrying the victim's bag. *Jackson v. State*, 2018 Ark. App. 330, 552 S.W.3d 55 (2018).

Appellate Review.

Substantial evidence supported defendant's first-degree murder conviction; substantial evidence, separate from his sister's testimony, connected defendant to the murder, and whether the sister was less credible because she was once

charged as an accomplice was for the jury to decide. However, the case was reversed and remanded for a new trial because the record was not sufficient for the Supreme Court of Arkansas to conduct its review under Ark. Sup. Ct. R. 4-3(i). *Thrower v. State*, 2018 Ark. 256, 554 S.W.3d 825 (2018).

Causation.

State produced sufficient evidence that defendant caused the victim's death; although the expert testimony left open possible concurrent causes for the victim's death, the skull injury clearly contributed to his death, defendant was the only person to hit the victim with the aluminum bat, and the victim's blood was found on the bat. *Rollf v. State*, 2015 Ark. App. 520, 472 S.W.3d 490 (2015).

Evidence.

Guilty verdict on a first-degree murder charge under subdivision (a)(2) of this section was based on substantial evidence because defendant was alone in his apartment with the victim, his girlfriend, the same night the two had argued and she was shot; defendant admitted at trial that he was holding a loaded .45, with his finger on the trigger, when the gun fired. *Shatwell v. State*, 2013 Ark. App. 568, 430 S.W.3d 142 (2013).

There was substantial evidence to support defendant's conviction for first-degree murder, including defendant's statements to police, testimony that the victim feared defendant, and testimony from defendant's father that he saw defendant shoot the victim, and the jury was free not to believe defendant's justification defense. *Airsman v. State*, 2014 Ark. 500, 451 S.W.3d 565 (2014).

One eyewitness unequivocally identified defendant in a photo lineup and at trial as the person who shot the victim and the eyewitness, and his testimony was not so inherently improbable, and thus substantial evidence supported de-

defendant's first-degree murder and attempted first-degree murder convictions. *Thomas v. State*, 2014 Ark. App. 492, 441 S.W.3d 918 (2014).

Evidence presented was substantial enough that the jury did not have to resort to conjecture to convict defendant of first-degree murder, given in part that witnesses testified that defendant and the victim had been fighting, and although defendant claimed self-defense, the victim was shot in the head, which supported the idea that the victim was shot intentionally, not during a struggle for defendant's life. *Toombs v. State*, 2015 Ark. App. 71, appeal dismissed, 2015 Ark. 471 (2015).

Defendant was properly convicted of first-degree murder because defendant acted with the purpose to cause the victim's death in that defendant, instead of leaving when defendant's paramour became angry and intoxicated, retrieved a handgun, hid it under a sofa cushion beside defendant, and shot defendant's paramour, after the paramour threw a cup of wine at defendant, when the paramour was in a vulnerable position reclined in the paramour's chair. *Scott-Paxson v. State*, 2015 Ark. App. 149, 457 S.W.3d 311 (2015).

It was defendant's brother who fired the shot that killed the victim, and although defendant claimed the State failed to prove it was his conscious object to assist his brother, the law in Arkansas made no distinction between the criminal liability of a principal and an accomplice; defendant drove around with the stated purpose to assist in hunting down and killing the victim, and thus the evidence supported his convictions of first-degree murder and committing a terroristic act, and the circuit court properly denied his motions for directed verdict. *Starling v. State*, 2015 Ark. App. 429, 468 S.W.3d 294 (2015).

Evidence was sufficient to support a conviction for first-degree murder because the victim felt threatened by defendant, defendant fired shots towards the victim while he was sitting in a car, and the victim retaliated by firing shots towards defendant. *Fowler v. State*, 2015 Ark. App. 579, 474 S.W.3d 120 (2015).

Circuit court did not err in denying defendant's motions for directed verdict because, through the testimony and evidence presented at trial, the jury was

apprised of the involvement of the witnesses in the shooting of the victim, and the jury was presented with evidence that defendant chased the victim, blocked the victim's vehicle with defendant's vehicle, and ran up to the victim's car, shooting once into the hood of the car and a second time through the windshield of the car, killing the victim. *Starling v. State*, 2016 Ark. 20, 480 S.W.3d 158 (2016).

Substantial evidence supported a first-degree felony murder conviction and three terroristic-act convictions under § 5-13-310 where the State was only required to prove that defendant in fact shot at the conveyance the victims were occupying regardless of whether he intended to do so, and three eyewitnesses testified that the surviving victim was in the vehicle when defendant shot at it. *Shelton v. State*, 2017 Ark. App. 195, 517 S.W.3d 461 (2017).

Substantial evidence supported defendant's conviction for first-degree murder under the felony murder rule because defendant shot and killed a responding auxiliary sheriff's deputy while defendant was hiding two hours after fleeing from a residential burglary with items taken in the burglary. Furthermore, the jury reasonably found that defendant was not justified in defendant's use of deadly force. *Kauffeld v. State*, 2017 Ark. App. 440, 528 S.W.3d 302 (2017).

Evidence was sufficient to convict defendant of first-degree murder because, after stabbing the victim, defendant immediately started trying to cover up evidence when she hid the knife and returned asking another individual what happened; defendant lied to the police during her first interview about her involvement; lying about a crime could indicate a consciousness of guilt, and a jury could properly consider an attempt to cover up one's connection to a crime as proof of a purposeful mental state; and, contrary to defendant's statement to police that she barely swung the knife, the medical examiner testified that the blade had gone halfway through the victim's body. *Stearns v. State*, 2017 Ark. App. 472, 529 S.W.3d 654 (2017).

Although the circuit court erred in allowing the State to introduce defendant's text message, the error was harmless because the evidence of defendant's guilt was overwhelming, and any prejudice

caused by the introduction of the text message was slight; there was substantial evidence that defendant killed the victim by intentionally running over her with his truck multiple times. *Cutsinger v. State*, 2017 Ark. App. 647, 536 S.W.3d 134 (2017).

Circuit court did not err in denying defendant's motion for directed verdict as the evidence was sufficient to convict him of first-degree murder; defendant's mother testified at trial that her son told her that he had picked up the victim and helped her into the living room, and the DNA supervisor of the DNA section of the State Crime Laboratory testified that DNA found on the victim's left and right hands was consistent with the DNA profile obtained from defendant. *Arnold v. State*, 2018 Ark. 343, 561 S.W.3d 727 (2018).

Substantial evidence supported the murder convictions where according to defendant's own confession, he was alone with the two victims and shot them, and the fact that he asked the men to return to his house and had a gun hidden within reach was evidence that he planned the murders. *Mosby v. State*, 2018 Ark. App. 139, 544 S.W.3d 78 (2018).

Sufficient, direct evidence supported defendant's first-degree murder conviction because (1) a witness who stated she knew defendant and the victim said she saw defendant shoot the victim, (2) other witnesses confirmed the witness was near where the shooting occurred, (3) another witness said defendant shot the victim, (4) a medical examiner said the victim died from a gunshot wound, (5) police found a nine-millimeter shell casing near the victim's body, and witnesses said defendant's father showed the witnesses what looked like a nine-millimeter gun and said the gun was the murder weapon, and (6) any inconsistency in testimony went to weight rather than admissibility. *Green v. State*, 2018 Ark. App. 145, 544 S.W.3d 574 (2018).

Furtherance or Perpetration of Felony.

Circuit court did not err in denying defendant's directed-verdict motion in regard to the terroristic acts where the witnesses testified that he had pointed a gun and shot at the vehicle several times, and the officers testified as to the damage done

to the vehicle. The evidence was sufficient to support the jury's inference that defendant shot the vehicle with the intent to cause property damage. *Noble v. State*, 2017 Ark. 142, 516 S.W.3d 727 (2017).

Looking at the plain language of this section, a person commits murder in the first degree if, in the course of and in furtherance of the felony terroristic act, the person causes the death of any person. *Noble v. State*, 2017 Ark. 142, 516 S.W.3d 727 (2017).

Circuit court properly denied defendant's motions for directed verdict on the charge of first-degree murder because there was substantial evidence that defendant "in the course of and in furtherance of" committing the terroristic acts of shooting at an occupied vehicle with the intent to cause property damage, caused the death of one of the occupants of the vehicle, defendant had an independent objective to commit terroristic acts, and his intent related to the acts of terrorism, not to the murder. *Noble v. State*, 2017 Ark. 142, 516 S.W.3d 727 (2017).

Instructions.

In a first-degree murder case, the trial court did not abuse its discretion in instructing the jury on the lesser-included offense of second-degree murder because the evidence provided a rational basis for an acquittal on the first-degree-murder charge and a conviction on the second-degree-murder charge as defendant did not shoot and kill the victim, but handed his gun to codefendant; defendant could not have known with absolute certainty what codefendant would do; and the jury could have concluded that defendant knowingly caused the death of another person under circumstances manifesting extreme indifference to the value of human life in that he was practically certain that his conduct would cause the death of the victim. *Northern v. State*, 2015 Ark. App. 426, 467 S.W.3d 755 (2015).

Intent.

There was substantial evidence from which the jury could have inferred that it was defendant's conscious object to cause the victim's death, because defendant placed the gun less than one inch away from her head and pulled the trigger, killing her. *Williamson v. State*, 2013 Ark. 347, 429 S.W.3d 250 (2013).

Evidence was sufficient to support defendant's first-degree murder conviction because it supported the jury's determination that he purposely fired the fatal shot into his wife's right cheek at close range inside their vehicle. Two witnesses testified that defendant and his wife were fighting in the highway just before the shooting, the children's testimony made it abundantly clear that defendant raised the gun and shot his wife, and the children and another witness testified that before running into the woods defendant fired a shot at the witness. *Drennan v. State*, 2018 Ark. 328, 559 S.W.3d 262 (2018).

—Evidence.

Circuit court did not err in denying defendant's motion for directed verdict on a first-degree murder charge where defendant lied about seeing the victim, had buried her body, and had disposed of a necktie and bag, and thus, the jury could have concluded from the testimony and circumstantial evidence that he had placed a bag over the victim's head with the purpose of causing her death. *Williams v. State*, 2015 Ark. 316, 468 S.W.3d 776 (2015).

State produced sufficient evidence that defendant purposely killed the victim; it was defendant's conscious object to end the victim's life, given that even after defendant had beaten the victim with a bat for several minutes, and the victim begged her to stop, she did not stop, she made efforts to conceal the crime, including burying the victim's body, and she fled when investigators found the body. *Rollf v. State*, 2015 Ark. App. 520, 472 S.W.3d 490 (2015).

—Expert Testimony.

Where defendant was found guilty of first-degree murder and attempted first-degree murder, the trial court did not abuse its discretion in excluding certain expert testimony regarding defendant's capacity to form intent. The expert's report did not state that defendant lacked the capacity to form intent, only that it was impacted or impaired, and the expert also opined that defendant's psychotic disorder did not render him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Furthermore, there was ample

evidence of purposeful conduct where defendant left a bar and returned with a shotgun that he used against the victims. *Edwards v. State*, 2015 Ark. 377, 472 S.W.3d 479 (2015).

Where the trial court excluded expert testimony in a first-degree murder trial regarding defendant's capacity to form intent, defendant's assertion that he was denied due process by the deprivation of his only defense was not preserved for appellate review because defendant did not raise the argument to the circuit court. *Edwards v. State*, 2015 Ark. 377, 472 S.W.3d 479 (2015).

Appellant's trial counsel was not ineffective for failing to elicit testimony from appellant's expert regarding appellant's general capacity to form intent. There was ample evidence of purposeful conduct as there was testimony that appellant came into the bar with a shotgun after a fight, indicated he was looking for the man who had fought with him, and then shot that man twice. Thus, appellant would have been unable to present a successful case on the affirmative defense regardless of any testimony from the expert regarding appellant's general capacity to form intent. *Edwards v. State*, 2017 Ark. 207 (2017).

Lesser-Included Offenses.

Circuit court, which instructed the jury on first-degree murder and the lesser-included offense of second-degree murder, did not err in refusing to instruct the jury on reckless manslaughter because the jury was presented with evidence that defendant chased the victim, blocked the victim's vehicle with defendant's vehicle, and ran up to the victim's car, shooting once into the hood of the car and a second time through the windshield of the car, killing the victim. *Starling v. State*, 2016 Ark. 20, 480 S.W.3d 158 (2016).

Preservation for Review.

Difference between the elements of capital murder and first-degree murder under the particular subsections of the statutes at issue is in terms of specificity; the capital-murder statute contains a list of specific felonies the defendant must have committed—here, aggravated robbery, whereas the first-degree murder statute simply requires a death to have occurred during the commission of “a

felony”. *Jackson v. State*, 2018 Ark. App. 330, 552 S.W.3d 55 (2018).

Defendant’s challenge to the sufficiency of the evidence supporting his conviction as an accomplice to first-degree murder was preserved; although defense counsel did not mention “first-degree murder” in his directed-verdict motion, considering the subsections of the statutes on which the jury was instructed, the elements of capital murder and first-degree murder were the same. *Jackson v. State*, 2018 Ark. App. 330, 552 S.W.3d 55 (2018).

Sentence.

Habeas relief was not warranted because an applicant was charged under a former first-degree murder statute where a murder was committed in the course of a robbery, and he was properly sentenced to life imprisonment without parole on his plea of guilty to capital-felony murder. An argument that murder in the first degree and capital murder were separate offenses with a separate penalty was re-

jected. *Gooch v. Hobbs*, 2014 Ark. 73 (2014) (Decided under former § 41-2205).

Circuit court properly denied defendant’s petition for writ of habeas corpus because the sentence of life imprisonment that was imposed after he entered a negotiated plea of guilty to first-degree murder when he was 15 years old did not violate the Eighth Amendment, as a 2017 statutory amendment created a possibility of parole. *Lohbauer v. Kelley*, 2018 Ark. 26 (2018).

Trial court’s erroneous instruction during the sentencing phase that defendant would be eligible for parole after serving 70% of his sentence for first-degree murder did not provide any relief to defendant, because he failed to object to the error when it occurred and the error did not fit within the third *Wicks* exception concerning certain flagrant and highly prejudicial errors. *Muhammad v. State*, 2019 Ark. App. 87, 572 S.W.3d 21 (2019).

Cited: *Bramlett v. Hobbs*, 2015 Ark. 146, 463 S.W.3d 283 (2015).

5-10-103. Murder in the second degree.

CASE NOTES

ANALYSIS

Defenses and Justification.

Evidence.

—Causation.

Instructions.

Defenses and Justification.

Substantial evidence existed to support a second-degree murder conviction because defendant’s justification defense could have been reasonably rejected; the jury could have credited testimony indicating that defendant walked towards the victim holding a gun after being told that the girls present did not want to fight. *Moody v. State*, 2014 Ark. App. 538, 444 S.W.3d 389 (2014).

In a second-degree murder case, defendant’s motion for a directed verdict was properly denied as a jury could find that the defense of justification was without merit because defendant’s conduct of intentionally firing eight warning shots at the victim established extreme indifference to human life; the simple act of pointing a loaded gun at the victim was

enough to satisfy the intent standard of second-degree murder; and defendant was not justified in using deadly force against the victim as he initiated the situation that brought about his use of deadly force, evidence at the crime scene did not support defendant’s assertion that he was backing up when firing shots, and an eyewitness testified that the victim never charged at defendant. *Sullivan v. State*, 2015 Ark. App. 514, 470 S.W.3d 312 (2015).

Evidence was sufficient to convict defendant of second-degree murder where the State’s evidence rebutted defendant’s claim of justification; defendant stabbed the victim, threw his knife in a creek, fled the scene, failed to alert law enforcement, and threw away his clothes in a dumpster at a hotel. Moreover, a jailhouse witness testified that defendant had stated that the crime was not committed in self-defense; rather, defendant stated he killed the victim during an attempted theft. *Bailey v. State*, 2016 Ark. App. 209, 489 S.W.3d 203 (2016).

Evidence was sufficient to support a

conviction for second-degree murder because defendant was not justified in using deadly force against the victim based on a belief that the victim was reaching for a gun; defendant was the first and only person to draw a weapon, and surveillance video showed that defendant was the initial aggressor and failed to retreat. *Wade v. State*, 2017 Ark. App. 157, 516 S.W.3d 772 (2017).

Evidence.

Evidence was sufficient to convict defendant of second-degree murder as the jury could have reasonably inferred that she intended to seriously injure the victim because she used scissors, an instrument that could be a deadly weapon; the cumulative number of injuries, which was 68, gave rise to the inference that she intended serious harm; most of the injuries were inflicted to the victim’s face and head; and an officer testified that defendant told him that she had wanted to kill the victim. *Hooks v. State*, 2013 Ark. App. 728, 431 S.W.3d 333 (2013).

Defendant waived his sufficiency argument for his second-degree-murder conviction as his directed-verdict motion was based on first-degree murder, and the evidence supported a conviction for second-degree murder. *Burnell v. State*, 2016 Ark. App. 10 (2016).

Evidence was adequate to support the jury’s finding that defendant knowingly caused the victim’s death where it showed that he took a loaded rifle from his truck and shot it at the victim from a distance of approximately 65 feet, he admitted that

he pulled the trigger at least 13 times, and he did not dispute that five shots hit the victim and caused his death. *Draft v. State*, 2016 Ark. App. 216, 489 S.W.3d 712 (2016).

—Causation.

Sufficient evidence supported defendant’s conviction for second-degree murder; while the concurrent causes—the surgical complications, ensuing epidural hematoma, and pneumonia—might have contributed to the victim’s death, defendant’s conduct in beating and kicking the victim in the head, thereby causing the initial subdural hematoma, was the cause of his death. *Claggett v. State*, 2019 Ark. App. 208, 575 S.W.3d 169 (2019).

Instructions.

In a first-degree murder case, the trial court did not abuse its discretion in instructing the jury on the lesser-included offense of second-degree murder because the evidence provided a rational basis for an acquittal on the first-degree-murder charge and a conviction on the second-degree-murder charge as defendant did not shoot and kill the victim, but handed his gun to codefendant; defendant could not have known with absolute certainty what codefendant would do; and the jury could have concluded that defendant knowingly caused the death of another person under circumstances manifesting extreme indifference to the value of human life in that he was practically certain that his conduct would cause the death of the victim. *Northern v. State*, 2015 Ark. App. 426, 467 S.W.3d 755 (2015).

5-10-104. Manslaughter.

RESEARCH REFERENCES

ALR. Admissibility of Suicide Note in Criminal Proceedings. 13 A.L.R.7th Art. 6 (2015).

CASE NOTES

ANALYSIS

Extreme Emotional Disturbance.
Instructions.

Lesser-Included Offenses.
Provocation, Justification, Etc.
Reckless Conduct.
Sentence.

Extreme Emotional Disturbance.

There was no evidence that the victim provoked defendant physically or otherwise to have caused the requisite extreme emotional disturbance as referenced in the statute. *Bowden v. State*, 2014 Ark. 168 (2014).

In a case where defendant was convicted of reckless conduct manslaughter, the circuit court did not abuse its discretion by refusing to give an instruction on extreme-emotional-disturbance-manslaughter because the evidence failed to show that defendant was provoked by the victim or that the victim was threatening defendant or attempting to commit violence on defendant at the time of the murder, as defendant testified that he did not know the victim and that he had not intended to shoot anyone; and, although defendant did respond to a physical fight prior to the shooting, the victim was not a party to that fight and thus was not the source of any provocation that might have spurred or incited defendant to fire his gun. *Williams v. State*, 2015 Ark. App. 262 (2015).

Trial counsel was not ineffective in failing to present a proper jury instruction on extreme emotional disturbance manslaughter; although the victim may have been the initial aggressor, petitioner had initiated a second encounter with a firearm in tow and thus he had invited the provocation that led to the victim's death and was not entitled to a jury instruction on extreme emotional disturbance. Further, even assuming trial counsel was deficient, petitioner failed to demonstrate prejudice. *Douglas v. State*, 2019 Ark. 57, 567 S.W.3d 483 (2019).

Instructions.

Defendants were not entitled to a manslaughter instruction unless there was a showing that defendants killed the victim in the moment following provocation, and here, defendant did not kill his mother at that time, but instead had to drive to another county, get a shovel out of his mother's shed, then beat down the back door to her home before beating her to death. *Bowden v. State*, 2014 Ark. 168 (2014).

Trial court did not err in instructing the jury on extreme-emotional-disturbance manslaughter because the court did not delegate its duty to instruct the jury to

counsel, as defendant alleged on appeal, as it was the court, not counsel, that gave the jury the agreed upon instructions. *Sims v. State*, 2014 Ark. App. 312 (2014).

Facts of this case did not give rise to the provocation necessary to warrant the giving of an extreme emotional disturbance manslaughter instruction, as there was no evidence that the victim was armed, and even assuming that the victim's crude and taunting words about defendant's child constituted a threat, case law held that mere threats were insufficiently provocative when the person killed was not armed and committing a violent act against the defendant, and thus the circuit court did not abuse its discretion in refusing to give this instruction. *Cody v. State*, 2014 Ark. App. 686, 449 S.W.3d 712 (2014).

Circuit court did not err in denying appellant's petition for postconviction relief because appellant could not establish that prejudice resulted from counsel's failure to request an instruction on the lesser-included offense of manslaughter since the jury returned a guilty verdict on the greater offense of first-degree murder. *Sims v. State*, 2015 Ark. 363, 472 S.W.3d 107 (2015).

Circuit court did not err in denying appellant's petition for postconviction relief because appellant did not receive ineffective assistance of counsel; the instruction on extreme emotional disturbance manslaughter complied with the Supreme Court's ruling in a case that took place one month before appellant's trial, and counsel was not ineffective for failing to have the foresight to predict all revisions to the instructions that were not directly mandated by that decision. *Sims v. State*, 2015 Ark. 363, 472 S.W.3d 107 (2015).

Trial court did not err by failing to instruct on attempted reckless manslaughter as a lesser-included offense of attempted second-degree murder because the crime of attempted reckless manslaughter is inherently contradictory. The attempted offense involved an intentional act, and it would have been illogical to ask the jury to find that defendant intended to act recklessly or that he purposely engaged in conduct that was a substantial step in a course of conduct intended to culminate in acting recklessly. Even if the instruction was based on sound law, there was no rational basis for giving it in this

case where defendant's actions in running over people were intentional, regardless of whether he intended to bring about the particular result of death. *Allen v. State*, 2015 Ark. App. 360, 465 S.W.3d 9 (2015).

Lesser-Included Offenses.

In a prosecution of defendant on two counts of first-degree murder, the circuit court did not abuse its discretion in refusing to instruct the jury on the charge of manslaughter as a lesser-included offense of first-degree murder. The record did not reveal any provocation, such as physical fighting, a threat, or a brandished weapon, by either victim. *Davis v. State*, 2015 Ark. 284 (2015).

Circuit court did not err in denying a jury instruction on the extreme-emotional-disturbance formulation of manslaughter pursuant to subdivision (a)(1) of this section where there was no factual basis to show that defendant killed a corrections officer in a moment following provocation, and his argument that prison was stressful and that a reasonable person would have done the same thing was not convincing. *Johnson v. State*, 2016 Ark. 156, 489 S.W.3d 668 (2016).

Provocation, Justification, Etc.

To the extent defendant argued that a doctor's testimony was relevant to prove that defendant believed his mother was poisoning him and his stepfather, and that such belief was provocation, his argument was not well taken, as even the doctor opined that defendant was able to appreciate the wrongfulness of his behavior and had the ability to conform his behavior to the requirements of the law if he chose to do so. *Bowden v. State*, 2014 Ark. 168 (2014).

In a trial for manslaughter under this section, the circuit court erred when it did not instruct the jury on justification because, under § 5-2-614, if defendant was reckless or negligent in forming the belief

that force was necessary, then, and only then, was the defense unavailable; however, if defendant was not reckless or negligent in forming his belief, the defense was available, and that was a decision for the jury. *Schnarr v. State*, 2018 Ark. 333, 561 S.W.3d 308 (2018).

Reckless Conduct.

Even if a circuit court erred in admitting the hearsay testimony of witnesses under Ark. R. Evid. 803(3), the error was harmless as to the offense of manslaughter; the evidence showed that defendant, while intoxicated, pressed a loaded shotgun firmly against the back of the victim's neck when the shotgun discharged and that the shotgun discharges when the hammer has been pulled back and the trigger is pulled, and the jury acquitted defendant of causing the victim's death either with the purpose to do so or knowingly under circumstances manifesting extreme indifference to the value of human life. *Davis v. State*, 2018 Ark. App. 383, 555 S.W.3d 892 (2018).

Sentence.

Trial court lacked authority to impose a 10-year enhanced sentence on defendant for committing manslaughter in the presence of a child because the sentence was illegal where manslaughter was not referenced in the enhancement statute. *Hart v. State*, 2014 Ark. 250 (2014).

Defendant's sentence for manslaughter was illegal on its face, as the judgment reflected a sentence of zero years' imprisonment for the manslaughter conviction, a Class C felony, which required a three-year minimum; however, as the State did not file a notice of appeal or of cross-appeal, the legality of the manslaughter sentence could not be considered. *Blackwell v. State*, 2015 Ark. App. 96, 455 S.W.3d 848 (2015).

Cited: *Starling v. State*, 2016 Ark. 20, 480 S.W.3d 158 (2016).

5-10-105. Negligent homicide.

RESEARCH REFERENCES

ALR. Establishment of Negligence Within Meaning of Statute Penalizing Negligent Homicide by Operation of Mo-

tor Vehicle — Speeding or Driving at Unsafe Speed. 84 A.L.R.6th 427.

CASE NOTES

ANALYSIS

Construction.
Evidence.
Instructions.
Lesser Included Offenses.
Method of Analysis.
—Time.
Scrivener's Error.
Standard of Care.

Construction.

Where the statute defined what blood alcohol content (BAC) could not be presumed as intoxication as well as the range of BAC that could be used as a factor in proving intoxication, it was reasonable to assume that a BAC above the referenced amounts may alone have been determined to be proof of intoxication. *Fowler v. State*, 2014 Ark. App. 460, 441 S.W.3d 41 (2014).

Evidence.

Substantial evidence supported defendant's conviction under subdivision (a)(1)(B)(i) of this section where his blood had been drawn within the timeframe permitted by § 5-65-206(a) and his BAC was 0.16, which was twice the legal limit. *Fowler v. State*, 2014 Ark. App. 460, 441 S.W.3d 41 (2014).

Evidence was sufficient to sustain defendant's negligent homicide conviction where the eyewitness and investigating officer testimony as to the road conditions and lack of water puddles at the scene of the accident allowed the jury to infer that defendant's car had not hydroplaned, and there was no evidence that defendant had braked, swerved, or otherwise done anything to avoid hitting the victim. *Sizemore v. State*, 2015 Ark. App. 295, 462 S.W.3d 364 (2015).

Substantial evidence supported defendant's conviction of misdemeanor negligent homicide; the weather conditions were clear on the night in question, defendant was observed crossing five lanes of traffic at high speed and rolling his vehicle, the vehicle's black box indicated that the brakes were never engaged, plus three cans of air duster had been purchased minutes before the accident and a blood sample had detected the presence of difluoroethane, a gas found in air-duster canisters, in defendant's blood. *Sizemore*

v. State, 2015 Ark. App. 728, 478 S.W.3d 281 (2015).

Circuit court did not err in denying defendant's motion for a directed verdict on the negligent homicide charges given the testimony that defendant and his car smelled of alcohol when a witness arrived on the scene, defendant smelled of alcohol and appeared to be impaired when officers arrived at his stepsister's house hours later, and the argument that the driver of the other car could have been the cause of the accident had not been preserved for review. *Rabion v. State*, 2017 Ark. App. 538, 532 S.W.3d 598 (2017).

Instructions.

Defendant's argument that the trial court erred in refusing to give a jury instruction on the lesser-included offense of negligent homicide was not preserved for review because defendant failed to proffer a written copy of his proposed instruction. *Campbell v. State*, 2017 Ark. App. 340, 525 S.W.3d 465 (2017).

Lesser Included Offenses.

Negligent homicide instruction was not warranted because there was no rational basis to conclude that defendant's actions were merely negligent where defendant reached under his car seat, chambered a round, and intentionally fired the weapon directly at the victim's chest. *Bennett v. State*, 2014 Ark. App. 624, 447 S.W.3d 602 (2014).

Circuit court did not err in refusing to give instructions on negligent homicide where defendant intentionally fired three shots at the victim at fairly close range, and thus, there was no evidence to justify a finding that he was unaware that his conduct would have resulted in the victim's death. *Schnarr v. State*, 2017 Ark. 10 (2017).

Method of Analysis.**—Time.**

Substantial evidence supported defendant's conviction under subdivision (a)(1)(B)(i) of this section where his blood had been drawn within the timeframe permitted by § 5-65-206(a) and his BAC was 0.16, which was twice the legal limit. *Fowler v. State*, 2014 Ark. App. 460, 441 S.W.3d 41 (2014).

Scrivener’s Error.

Although defendant was found guilty of committing misdemeanor negligent homicide, the sentencing order incorrectly recited that he was convicted of the offense of negligent homicide, a Class B felony, and this scrivener’s error was to be corrected. *Sizemore v. State*, 2015 Ark. App. 728, 478 S.W.3d 281 (2015).

Standard of Care.

Circuit court erred in denying defendant’s motion to dismiss a negligent homicide charge under subdivision (b)(1) of this

section; although there was no question that defendant’s failure to see the decedent’s vehicle resulted in the fatal accident, there was no evidence that defendant was speeding, driving erratically, under the influence of alcohol, using a phone, or engaged in some similar conduct, and thus, the evidence fell short of establishing criminal negligence. *Gill v. State*, 2015 Ark. 421, 474 S.W.3d 77 (2015).

Cited: *Bramlett v. Hobbs*, 2015 Ark. 146, 463 S.W.3d 283 (2015).

5-10-106. Physician-assisted suicide.

(a)(1) As used in this section, “physician-assisted suicide” means a physician or healthcare provider participating in a medical procedure or knowingly prescribing any drug, compound, or substance for the express purpose of assisting a patient to intentionally end the patient’s life.

(2) However, “physician-assisted suicide” does not apply to a person participating in the execution of a person sentenced by a court to death by lethal injection.

(b) It is unlawful for a physician or healthcare provider to commit the offense of physician-assisted suicide by:

(1) Prescribing any drug, compound, or substance to a patient with the express purpose of assisting the patient to intentionally end the patient’s life; or

(2) Assisting in any medical procedure for the express purpose of assisting a patient to intentionally end the patient’s life.

(c) Physician-assisted suicide is a Class B felony.

(d) This section does not prohibit a:

(1) Physician or healthcare provider from carrying out an advanced directive or living will; or

(2) Physician from prescribing any drug, compound, or substance for the specific purpose of pain relief.

History. Acts 1999, No. 394, § 1; 2007, No. 827, §§ 22, 23; 2019, No. 930, § 1.

Amendments. The 2019 amendment, in (c), substituted “Physician-assisted suicide is” for “Upon conviction, any physician or health care provider violating sub-

section (b) of this section is guilty of” and substituted “Class B” for “Class C”; substituted “This section does not prohibit” for “Nothing in this section prohibits” in the introductory language of (d); and made stylistic changes.

RESEARCH REFERENCES

ALR. Admissibility of Suicide Note in Criminal Proceedings. 13 A.L.R.7th Art. 6 (2015).

Ark. L. Rev. Browne Lewis, A Deliber-

ate Departure: Making Physician-Assisted Suicide Comfortable for Vulnerable Patients, 70 Ark. L. Rev. 1 (2017).

5-10-107. Encouraging the suicide of another person.

- (a) As used in this section, “encourage” means to persuade, incite, or urge.
- (b) A person commits the offense of encouraging the suicide of another person if:
 - (1) The person uses persistent language, either spoken or written, to purposely encourage another person to commit suicide; and
 - (2) As a proximate result of the person’s encouraging the suicide of the other person, the other person commits suicide or attempts to commit suicide and the attempt results in serious physical injury.
- (c) Encouraging the suicide of another person is a Class D felony.
- (d) A person may not be convicted of encouraging the suicide of another person if the person has been charged with, tried for, or convicted of a homicide offense under the theory of accomplice liability that arises out of the same set of facts.

History. Acts 2019, No. 962, § 1.

CHAPTER 11

KIDNAPPING AND RELATED OFFENSES

5-11-101. Definitions.

CASE NOTES

Restraint Without Consent.
Sufficient evidence supported defendant’s kidnapping conviction as there was overwhelming evidence that defendant restrained the victim, and he threatened to kill her and her son; the victim testified how defendant restrained her with cables and locks for hours while he severely beat her, and defendant repeatedly told her that he was going to kill her and behead her son. The fact that the victim did not attempt to escape immediately after the restraints had been removed did not negate defendant’s criminal conduct, nor did

the fact that he later helped her bathe. *Reynolds v. State*, 2016 Ark. 214, 492 S.W.3d 491 (2016).
There was substantial evidence of restraint of the victim’s liberty as the victim was tackled to the ground by defendant when jogging on a trail at a lake, and defendant straddled the victim’s body, beat her with his fists, and choked her with his hands. Defendant also dragged the victim into the woods until she could no longer see the running trail. *Turner v. State*, 2018 Ark. App. 5, 538 S.W.3d 227 (2018).

5-11-102. Kidnapping.

CASE NOTES

ANALYSIS	Accomplice. Trial court properly found defendant guilty as an accomplice to the crime of kidnapping because defendant not only accompanied her son to the victim’s apartment, she also assisted him in beating her,
Accomplice.	
Evidence.	
Federal Law.	
Restraint.	

encouraged him to “get” her, he forcibly exposed the victim to defendant, choked her, and then forced her down the hallway into a bedroom where he raped her orally and vaginally. *Singleton-Harris v. State*, 2014 Ark. App. 436, 439 S.W.3d 720 (2014).

Evidence.

Court did not err in denying defendant’s motions for a directed verdict on kidnapping charges, in violation of subdivision (a)(4) of this section, because evidence was offered to establish his relationship with the victims, evidence was offered that he always carried a knife and pistol, and evidence was offered of his attempt to conceal the crimes and to manufacture an alibi. *Green v. State*, 2013 Ark. 497, 430 S.W.3d 729 (2013).

Evidence was sufficient to support a conviction for kidnapping because the purpose of the restraint could have been inferred from circumstantial evidence where defendant had previously coerced the victim into having sex with him. Moreover, defendant was armed with a pistol and a screwdriver, and he threatened the victim that she would never see her son again. *Van Winkle v. State*, 2014 Ark. App. 591, 445 S.W.3d 542 (2014).

Evidence was sufficient to support defendant’s kidnapping conviction; there was evidence that he restrained his mother, given defendant’s concession that the charge of false imprisonment was proven, plus there was substantial testimony from his mother regarding his threats to kill her and his physical harm to her, and although defendant claimed that he did not threaten his mother, two witnesses testified otherwise, and witness credibility was for the jury to determine. *Ronk v. State*, 2016 Ark. App. 126 (2016).

Evidence supported defendant’s conviction for kidnapping because the victim identified defendant as the person who grabbed her as she ran along a paved trail at a lake, dragged her into the woods, threatened her, straddled her body, and beat and choked her. Furthermore, defendant’s DNA was found on sunglasses located near the victim’s headband and earbuds, defendant had a ring described by the victim, and eyewitnesses testified as to seeing defendant at the lake on the same day and the day before. *Turner v. State*, 2018 Ark. App. 5, 538 S.W.3d 227 (2018).

Federal Law.

Defendant had to be resentenced for violating 18 U.S.C. § 922(g)(1) because his 2006 Arkansas conviction for kidnapping did not qualify as a predicate offense for purposes of a sentencing enhancement under 18 U.S.C. § 924(e) as it was not a violent felony; this section was overbroad, and it was not divisible as the nefarious purposes listed in this section were means, not elements. *United States v. Coleman*, 918 F.3d 592 (8th Cir. 2019).

Restraint.

Sufficient evidence supported defendant’s kidnapping conviction as there was overwhelming evidence that defendant restrained the victim, and he threatened to kill her and her son; the victim testified how defendant restrained her with cables and locks for hours while he severely beat her, and defendant repeatedly told her that he was going to kill her and behead her son. The fact that the victim did not attempt to escape immediately after the restraints had been removed did not negate defendant’s criminal conduct, nor did the fact that he later helped her bathe. *Reynolds v. State*, 2016 Ark. 214, 492 S.W.3d 491 (2016).

5-11-103. False imprisonment in the first degree.

CASE NOTES

ANALYSIS

Restraint.
Violent Felony.

Restraint.

Evidence was sufficient to support defendant’s kidnapping conviction; there was evidence that he restrained his

mother, given defendant's concession that the charge of false imprisonment was proven, plus there was substantial testimony from his mother regarding his threats to kill her and his physical harm to her, and although defendant claimed that he did not threaten his mother, two witnesses testified otherwise, and witness credibility was for the jury to determine. *Ronk v. State*, 2016 Ark. App. 126 (2016).

Violent Felony.

During the penalty phase of petitioner's capital murder trial, his prior conviction

for false imprisonment, in violation of subsections (a) and (b) of this section, plainly qualified as a violent felony; the State presented a record of the prior conviction and thereby proved that he was convicted of the qualifying offense. *Dansby v. Hobbs*, 766 F.3d 809 (8th Cir. 2014), cert. denied, — U.S. —, 136 S. Ct. 297, 193 L. Ed. 2d 46 (2015).

5-11-104. False imprisonment in the second degree.

CASE NOTES

Cited: *Mosley v. State*, 2016 Ark. App. 353, 499 S.W.3d 226 (2016).

CHAPTER 12

ROBBERY

5-12-101. Definition.

CASE NOTES

Physical Force.

Evidence was sufficient to support defendant's robbery conviction, given that he pulled up to the victim in a car and asked if he could use the victim's phone, and when the victim refused, defendant punched him in the face, took the phone, and drove away; the victim positively identified defendant, who handed the phone over to the officers, and the circuit court was free to believe the testimony of the victim and not that of defendant, who claimed he was just borrowing the phone. *Muhammad v. State*, 2016 Ark. App. 285, 494 S.W.3d 440 (2016).

Evidence was sufficient to sustain defendant's robbery conviction where an undercover security guard testified that defendant placed a bottle of laundry detergent inside her flat purse, the purse bulged, defendant did not pay for the detergent before walking out of the store, she shoved the guard when he confronted her in the parking lot, and she fled the scene abruptly when confronted by loss-prevention officers. *Horton v. State*, 2017 Ark. App. 481, 530 S.W.3d 880 (2017).

Cited: *Cartwright v. State*, 2016 Ark. App. 425, 501 S.W.3d 849 (2016).

5-12-102. Robbery.**CASE NOTES****ANALYSIS**

Lesser Included Offenses.
Sufficiency of Evidence.

Lesser Included Offenses.

Theft is not a lesser-included offense of robbery pursuant to § 5-1-110(b). The wrongful appropriation of the victim's property is an essential element of theft, while robbery can be committed without actually taking the property of another, since robbery is defined as employing or threatening to employ physical force upon another with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter. *Cartwright v. State*, 2016 Ark. App. 425, 501 S.W.3d 849 (2016).

Sufficiency of Evidence.

There was substantial evidence to support convictions for two aggravated-robbery counts based on accomplice liability where defendant was in a car moving away from the robbery scene, he was found with roughly the same amount of money that was stolen in the robbery, and he used a false name. Moreover, one of the vehicle's passengers was wearing clothing that matched the description of the perpetrator. *Davis v. State*, 2013 Ark. App. 658, 430 S.W.3d 190 (2013).

Evidence was sufficient to support defendant's robbery conviction, given that he pulled up to the victim in a car and asked if he could use the victim's phone, and when the victim refused, defendant punched him in the face, took the phone, and drove away; the victim positively identified defendant, who handed the phone over to the officers, and the circuit court was free to believe the testimony of the victim and not that of defendant, who claimed he was just borrowing the phone. *Muhammad v. State*, 2016 Ark. App. 285, 494 S.W.3d 440 (2016).

There was sufficient evidence to support the allegations that defendant committed robbery. In addition to the fact that defendant was wearing a black long-sleeved shirt, which was what the victim testified the robber wore, the exact denominations of bills taken from a bank bag were in

defendant's pocket, and the exact denominations of wrapped coins, which were identified by the victim as being wrapped in the manner she wrapped coins, were in a backpack defendant was carrying. *Smith v. State*, 2016 Ark. App. 421, 501 S.W.3d 836 (2016).

There was more than substantial evidence to support defendant's conviction for robbery, where several witnesses testified that defendant shoved a store employee out of the way and swung at another store employee while trying to flee with a money bag. *Cartwright v. State*, 2016 Ark. App. 425, 501 S.W.3d 849 (2016).

Substantial evidence supported defendant's capital murder conviction under § 5-10-101, as there was sufficient evidence that defendant committed the underlying felony of attempted robbery under § 5-3-201(a)(2) and this section; defendant approached the victim with a weapon, demanded his phone, and pointed the weapon at the victim at point-blank range. *Hicks v. State*, 2017 Ark. 262, 526 S.W.3d 831 (2017).

Evidence was sufficient to sustain defendant's robbery conviction where an undercover security guard testified that defendant placed a bottle of laundry detergent inside her flat purse, the purse bulged, defendant did not pay for the detergent before walking out of the store, she shoved the guard when he confronted her in the parking lot, and she fled the scene abruptly when confronted by loss-prevention officers. *Horton v. State*, 2017 Ark. App. 481, 530 S.W.3d 880 (2017).

Evidence was sufficient to support defendant's robbery conviction because the hotel employee positively identified defendant as the person who robbed the hotel, defendant's cell phone was placed in a triangular area near the robbery around the time of the robbery, and he was stopped by officers not far from the robbery just minutes after it had taken place. *Lacefield v. State*, 2018 Ark. App. 481, 559 S.W.3d 311 (2018).

Evidence was sufficient to support defendant's robbery conviction because the store employee positively identified defen-

dant’s photo as the person who robbed the store, defendant’s cell phone was near the store around the time of the robbery, as well as around the time of other sightings of the “bearded bandit”. *Lacefield v. State*, 2018 Ark. App. 481, 559 S.W.3d 311 (2018).

Based on the circumstantial evidence introduced in a bench trial, including evidence defendant lured the victim to a park and shot him while he was keeping an eye

on a man in the park and defendant was arrested a few days after the shooting next to a car with items stolen from the victim’s truck, the trial court could have reasonably inferred that defendant shot the victim with the intent to take his truck and thus was guilty of aggravated robbery. *Campbell v. State*, 2019 Ark. App. 297, 577 S.W.3d 729 (2019).

Cited: *Means v. State*, 2015 Ark. App. 643, 476 S.W.3d 168 (2015).

5-12-103. Aggravated robbery.

CASE NOTES

ANALYSIS

Accomplice.
Evidence.
Sentence.
Statements.

Accomplice.

Evidence was sufficient to support convictions for aggravated robbery and capital murder because defendant’s intent was inferred from the actions of his accomplice; defendant’s statement to police provided direct evidence of the accomplice’s intent to commit an aggravated robbery, and his account of how the accomplice murdered the victim by shooting her in the forehead was substantial evidence of causing the death of a person under circumstances manifesting extreme indifference to the value of human life. There was ample proof of defendant’s participation as he accompanied others to the victim’s residence, persuaded her to open the door, helped search the residence, and collected and kept his own share of the property that was stolen. *Conway v. State*, 2016 Ark. 7, 479 S.W.3d 1 (2016).

There was sufficient evidence that defendant was an accomplice to the crimes of aggravated robbery and capital murder as defendant admitted that he and the codefendants sat in a car planning the theft of beer from a gas station and convenience store and surveillance videos showed that defendant and a codefendant rushed into the store together, that codefendant shot the store clerk, and that defendant attempted to open the cash register, appeared to look around for something to steal, and searched the victim’s pockets

before fleeing. *Williams v. State*, 2017 Ark. 287, 528 S.W.3d 839 (2017).

In a case where defendant was convicted of two counts of aggravated robbery, there was sufficient evidence presented to corroborate the accomplice’s testimony because defendant told a detective he was at the store on the date of the robbery; surveillance tapes showed defendant, co-defendant, and the accomplice in the store at the same time as the victim, leaving the store immediately after the victim, and leaving the parking lot right behind the victim; defendant’s mother testified that the vehicle police were searching for in connection with the aggravated robberies belonged to defendant; and, at trial, the victim’s sister identified defendant as the person who committed the aggravated robberies with co-defendant. *Foster v. State*, 2017 Ark. App. 63, 510 S.W.3d 782 (2017).

Because the status of the driver of the car and the juvenile who gave directions to the victim’s house as accomplices was a mixed question of law and fact, the trial court properly did not instruct the jury that they were accomplices as a matter of law as agreeing to drive defendant and the accomplice to the victim’s house with no questions asked did not conclusively show that the driver knew about or participated in the robbery or battery; it was the role of the jury to determine whether the juvenile had to have known that the robbery and battery were about to occur; and no testimony showed beyond dispute that either the driver or the juvenile knew of defendant’s plan to rob the victim or that they encouraged him to shoot the victim. *West v. State*, 2017 Ark. App. 416, 530 S.W.3d 355 (2017).

Substantial evidence supported defendant's convictions as an accomplice to first-degree murder and aggravated robbery. Defendant was in the proximity of the crime; a video put defendant inside the victim's home shortly before the video tended to establish the victim had been killed; and he had the opportunity to aid in the commission of the crime in that he returned quickly to the residence after the other party entered, using his shirt to open the door, and subsequently ran from the house carrying the victim's bag. *Jackson v. State*, 2018 Ark. App. 330, 552 S.W.3d 55 (2018).

Evidence was sufficient to convict defendant of aggravated robbery either as a principal or as an accomplice because defendant's boyfriend told her they were going to pick up the victim and that he intended to beat him up and take anything that the victim had on him; despite knowing the boyfriend's purpose, defendant still agreed to drive him; substantial corroborating evidence connecting defendant to the crime included two interviews she gave to the police and her written statement, which were admitted at trial; and the victim's death made the offense an aggravated robbery regardless of her knowledge of whether a gun might be used. *Vaughan v. State*, 2018 Ark. App. 439, 555 S.W.3d 922 (2018).

Evidence.

There was substantial evidence to support convictions for two aggravated-robbery counts based on accomplice liability where defendant was in a car moving away from the robbery scene, he was found with roughly the same amount of money that was stolen in the robbery, and he used a false name. Moreover, one of the vehicle's passengers was wearing clothing that matched the description of the perpetrator. *Davis v. State*, 2013 Ark. App. 658, 430 S.W.3d 190 (2013).

Evidence was sufficient to find defendant guilty of aggravated robbery and theft of property because, while the store's employees identified another person in the first photographic spread, they both identified him in a second spread and in court, the jury had before it witness testimony, a videotape, and photographs showing that defendant brought a backpack into the store, left it there, he possessed and used a gun, and his DNA was on a

mouthwash bottle found in the backpack. *Turner v. State*, 2014 Ark. 415, 443 S.W.3d 535 (2014).

Evidence was sufficient to support defendant's aggravated-robbery conviction under subdivision (a)(3) of this section where although it was illegal for the victim to possess the marijuana, it clearly had value, was subject to possession, and thus, fell within the definition of property and property of another person as set forth in § 5-36-101. *Gould v. State*, 2014 Ark. App. 543, 444 S.W.3d 408 (2014).

Evidence was sufficient to support defendant's convictions for aggravated robbery and theft of property because the State introduced crucial evidence through a witness that defendant confessed to committing the robbery and to using a .40-caliber pistol to do so; in addition to that direct evidence, the State introduced ample circumstantial evidence that tied defendant to the crime. *Chatmon v. State*, 2015 Ark. 28, 467 S.W.3d 731 (2015).

Trial court did not err in denying defendant's motion for a directed verdict on the aggravated-robbery offense as the State presented evidence that the victim suffered serious physical injury; as a result of the attack, the victim had little control over his right side, suffered partial memory loss, was confined to a wheelchair, and would require constant care for the rest of his life. *Britt v. State*, 2015 Ark. App. 456, 468 S.W.3d 285 (2015).

Evidence was sufficient for aggravated robbery, first-degree battery, and theft of property under \$1,000 convictions since defendant's arguments all presented questions of fact and involved the credibility and weight of the evidence, which were matters for the jury to decide; the jury heard all of the evidence, and defense counsel was permitted to cross-examine the witnesses to point out the very weaknesses that defendant complained of on appeal. As to Facebook conversations, the appellate court was able to consider both properly and improperly admitted evidence on a sufficiency of the evidence review. *Means v. State*, 2015 Ark. App. 643, 476 S.W.3d 168 (2015).

Evidence was sufficient in relation to a carjacking to convict defendant of aggravated robbery and theft, and to enhance the sentence due to the use of a firearm during the robbery, because the victim testified that defendant approached the

victim as she was about to get in her car and told her to move out of the way; when she did not immediately move away, defendant lifted his shirt, displaying the handle of a gun protruding from his pants; the victim thought defendant was going to pull out the gun, so she stepped back, and he entered her car and drove it away; the victim picked out defendant almost immediately from a photographic lineup; and the victim's unequivocal testimony identified defendant as the culprit. *Davis v. State*, 2016 Ark. App. 274, 493 S.W.3d 339 (2016).

Substantial evidence supported a guilty verdict for aggravated robbery and theft of property where a bank teller positively identified defendant as the robber, and he stated to the police that he had visited three banks, wore a mask, had a fake gun, and a teller at one bank threw money at him. *Boyd v. State*, 2016 Ark. App. 407, 500 S.W.3d 772 (2016).

Evidence was sufficient to convict defendant of aggravated robbery and first-degree battery because defendant, armed with a deadly weapon, along with the accomplice, forced his way into the victim's home and demanded marijuana, shot the victim when he did not produce marijuana, and stole a pair of the victim's shoes and a box of shotgun shells; the jury could conclude that a backpack and a cell phone belonged to defendant, or at least were used by him, and connected him with the shooting; and substantial evidence supported a determination that the juvenile was not an accomplice, that his testimony tended to connect defendant to the robbery and battery, and that his testimony independently established the commission of those crimes. *West v. State*, 2017 Ark. App. 416, 530 S.W.3d 355 (2017).

Substantial evidence supported the jury's finding that, while armed with a deadly weapon, defendant committed a robbery and committed aggravated robbery because according to defendant's detailed confession, he entered a bank with a handgun and demanded money; a teller testified that defendant pointed the gun at her and that she gave him a bag of money, and although she could not identify the masked robber, defendant identified himself as the perpetrator in his statement to the police. *Hamilton v. State*, 2017 Ark. App. 447, 526 S.W.3d 859 (2017).

Evidence was sufficient to convict defendant of aggravated robbery because the victim testified that she saw a gun in defendant's waistband and that defendant's hand was on the gun when he told her it was a robbery; the victim testified that she was scared, threw her hands in the air, and then gave money to defendant; and her fear was further manifested by her terrified demeanor on the phone with the 911 dispatcher and her trembling and tearful reaction when shown defendant's photo in a photo lineup of suspects; by telling the victim it was a robbery and holding his hand on a gun, defendant communicated a threat of imminent harm to the victim, and whether defendant verbally conveyed that he was going to harm the victim was irrelevant. *Rockins v. State*, 2018 Ark. App. 19, 541 S.W.3d 457 (2018).

Evidence was sufficient to support defendant's aggravated robbery conviction because the restaurant employee positively identified defendant, by his eyes, as the person that robbed the restaurant while wearing a mask and pointing a handgun at her; the next day a locksmith found a ski mask and gloves inside his dumpster that had not been there before, and DNA on the gloves matched defendant. *Lacefield v. State*, 2018 Ark. App. 481, 559 S.W.3d 311 (2018).

Evidence was sufficient to support defendant's aggravated-robbery conviction; the victim testified that defendant pointed a gun at him and threatened to kill him, and while defendant claimed that he did not have a gun, only a flashlight, and that he did not threaten to kill anyone, the jury chose to believe the victim. *Davidson v. State*, 2018 Ark. App. 632, 566 S.W.3d 151 (2018).

While the State's case against defendant for capital felony murder/aggravated robbery was premised on circumstantial evidence, testimony clearly corroborated an accomplice's testimony against defendant and the evidence was sufficient to support the jury's verdict even without the accomplice testimony; testimony from multiple witnesses demonstrated that three masked men entered a gas station convenience store, the man in red demanded money from the owner, shot him in the neck, and then turned his gun on an employee, shooting him in the face. Law-

shea v. State, 2019 Ark. 68, 567 S.W.3d 853 (2019).

Where cross-examination of the victim at trial revealed that the State’s exhibit of text messages between the defendant and victim was incomplete and that the victim had deleted some of the messages, the appellate court did not have to decide whether the circuit court erred in failing to strike the exhibit because any error that existed was harmless given the overwhelming evidence of defendant’s guilt that remained. Farmer v. State, 2019 Ark. App. 148, 571 S.W.3d 78 (2019).

Sentence.

Trial court did not err in denying defendant’s petition for writ of habeas corpus because the face of the order simply gave no indication that defendant was in any way sentenced for attempted capital murder, defendant’s life sentence for aggra-

vated robbery was a permitted sentence at the time of the offense and was neither cruel nor unusual, and defendant cited to no authority for his proposition that an information must contain the relevant sentencing range to be sought or that the failure to include such a range resulted in the State’s waiver of that sentence. Phillyaw v. Kelley, 2015 Ark. 465, 477 S.W.3d 503 (2015) (decision under prior law).

Statements.

Although defendant unequivocally invoked his right to remain silent, a detective never ceased questioning him, and defendant could not have waived the earlier invocation of his right. Due to the trial court’s prejudicial error in admitting defendant’s statement, his convictions for aggravated robbery and firearm enhancement were reversed. Coleman v. State, 2017 Ark. 218 (2017).

CHAPTER 13
ASSAULT AND BATTERY

SUBCHAPTER.

- 2. OFFENSES GENERALLY.
- 3. TERRORISTIC THREATS AND ACTS.

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-13-201. Battery in the first degree.
- 5-13-202. Battery in the second degree.
- 5-13-204. Aggravated assault.
- 5-13-211. Aggravated assault upon a law

enforcement officer or an employee of a correctional facility.

Effective Dates. Acts 2019, No. 582, § 2: Mar. 29, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that employees employed by, or who are working under a professional services contract with, the Department of Correction, the Department of Community Correction, or the Division of Youth Services of the Department of Human Services are some of the most vulnerable of all state employees given their close proximity to persons already convicted of a felony offense; that violence against these employees should not be tolerated; and that this act is immediately necessary because pro-

tecting correctional employees from violence in the workplace is a priority of the state. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto”.

Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is

found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncoded sections of this act preceding the emergency clause titled 'Funding and classification of cabinet-level department secre-

taries' and 'Transformation and Efficiencies Act transition team' should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019".

5-13-201. Battery in the first degree.

(a) A person commits battery in the first degree if:

(1) With the purpose of causing serious physical injury to another person, the person causes serious physical injury to any person by means of a deadly weapon;

(2) With the purpose of seriously and permanently disfiguring another person or of destroying, amputating, or permanently disabling a member or organ of that other person's body, the person causes such an injury to any person;

(3) The person causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life;

(4) Acting alone or with one (1) or more other persons:

(A) The person commits or attempts to commit a felony; and

(B) In the course of and in furtherance of the felony or in immediate flight from the felony:

(i) The person or an accomplice causes serious physical injury to any person under circumstances manifesting extreme indifference to the value of human life; or

(ii) Another person who is resisting the felony or flight causes serious physical injury to any person;

(5) With the purpose of causing serious physical injury to an unborn child or to a woman who is pregnant with an unborn child, the person causes serious physical injury to the unborn child;

(6) The person knowingly causes physical injury to a pregnant woman in the commission of a felony or a Class A misdemeanor, and in so doing, causes serious physical injury to the pregnant woman's unborn child, and the unborn child is subsequently born alive;

(7) The person knowingly, without legal justification, causes serious physical injury to a person he or she knows to be sixty (60) years of age or older or twelve (12) years of age or younger;

(8) With the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a firearm; or

(9) The person knowingly causes serious physical injury to any person four (4) years of age or younger under circumstances manifesting extreme indifference to the value of human life.

(b) It is an affirmative defense in any prosecution under subdivision (a)(4) of this section in which the defendant was not the only participant that the defendant:

- (1) Did not commit the battery or in any way solicit, command, induce, procure, counsel, or aid the battery’s commission;
 - (2) Was not armed with a deadly weapon;
 - (3) Reasonably believed that no other participant was armed with a deadly weapon; and
 - (4) Reasonably believed that no other participant intended to engage in conduct that could result in serious physical injury.
- (c)(1) Except as provided in subdivisions (c)(2) and (3) of this section, battery in the first degree is a Class B felony.

(2) Battery in the first degree is a Class Y felony under the circumstances described in subdivision (a)(2) or subdivision (a)(9) of this section.

(3) Battery in the first degree is a Class Y felony if the injured person is a law enforcement officer or an employee of a correctional facility, and is acting in the line of duty.

(d) As used in this section, “employee of a correctional facility” means a person who is employed by or working under a professional services contract with the Division of Correction or the Division of Community Correction.

History. Acts 1975, No. 280, § 1601; A.S.A. 1947, § 41-1601; Acts 1987, No. 482, § 1; 1995, No. 360, § 1; 1995, No. 1305, § 1; 2005, No. 1994, § 474; 2007, No. 622, § 1; 2007, No. 709, § 2; 2007, No. 827, § 26; 2019, No. 498, § 1; 2019, No. 582, § 1.

Amendments. The 2019 amendment by No. 498 inserted “sixty (60) years of age or older or” in (a)(7); and inserted “(a)(2) or subdivision” in (c)(2).
The 2019 amendment by No. 582 inserted “or an employee of a correctional facility and is” in (c)(3); and added (d).

CASE NOTES

ANALYSIS

- Accomplice.
- Culpable Mental State.
- Elements.
- Evidence.
- Federal Law.
- Instructions.
- Multiple Convictions.
- Physical Injury.
- Violation of Probation.
- Violation of Suspension.

Accomplice.
Because the status of the driver of the car and the juvenile who gave directions to the victim’s house as accomplices was a mixed question of law and fact, the trial court properly did not instruct the jury that they were accomplices as a matter of

law as agreeing to drive defendant and the accomplice to the victim’s house with no questions asked did not conclusively show that the driver knew about or participated in the robbery or battery; it was the role of the jury to determine whether the juvenile had to have known that the robbery and battery were about to occur; and no testimony showed beyond dispute that either the driver or the juvenile knew of defendant’s plan to rob the victim or that they encouraged him to shoot the victim. *West v. State*, 2017 Ark. App. 416, 530 S.W.3d 355 (2017).

Culpable Mental State.
Defendant was not career offender because his conviction for first-degree battery was not crime of violence under force clause of career offender guideline as crime could be violated by reckless driv-

ing, and his conviction was also not crime of violence under residual clause of guideline as statute of conviction was not similar in kind or degree of risk to enumerated crimes. *United States v. Boose*, 739 F.3d 1185 (8th Cir. 2014).

Evidence was sufficient to sustain the jury's finding that defendant acted knowingly and with extreme indifference to the value of human life where defendant was alone with the baby for approximately two hours, the baby developed a deformed head by the time the mother arrived home, defendant packed a bag and insisted on driving his own vehicle to the hospital, and defendant initially claimed that nothing had happened and then offered two improbable explanations for how the baby's skull had been fractured. *Suchey v. State*, 2016 Ark. App. 225, 490 S.W.3d 320 (2016).

Defendant's motion for directed verdict on the charge of first-degree battery against a law enforcement officer was properly denied as the evidence was sufficient to support the jury's finding that defendant caused serious physical injury to the police chief under circumstances manifesting extreme indifference to the value of human life. Defendant told law enforcement that he was armed with two firearms, that he wanted to go out in a battle, and that he would come to law enforcement if law enforcement did not come to his apartment; he intentionally fired a round as he came out of his apartment to encounter law enforcement personnel; and the police chief was subsequently struck with a bullet from one of defendant's firearms. *Rongey v. State*, 2018 Ark. App. 617, 566 S.W.3d 161 (2018).

Elements.

Plain language of this section does not require the State to additionally prove that an offender knew or should have known that his or her victim was a law enforcement officer acting in the line of duty. Because the jury found beyond a reasonable doubt that defendant, with the purpose of causing physical injury to another person, caused physical injury to the victim by means of a firearm and that the victim was a law enforcement officer acting in the line of duty, defendant was guilty of a Class Y felony. *Boose v. State*, 2017 Ark. App. 302 (2017).

Circuit court did not err in allowing the amendment of the battery charge from subdivision (a)(8) of this section to subdivision (a)(4) of this section as the amendment did not change the nature of the charge, just the manner in which the battery took place, and defendant offered no argument of prejudice. *Davis v. State*, 2017 Ark. App. 496, 532 S.W.3d 589 (2017).

Evidence.

Evidence was sufficient for aggravated robbery, first-degree battery, and theft of property under \$1,000 convictions since defendant's arguments all presented questions of fact and involved the credibility and weight of the evidence, which were matters for the jury to decide; the jury heard all of the evidence, and defense counsel was permitted to cross-examine the witnesses to point out the very weaknesses that defendant complained of on appeal. As to Facebook conversations, the appellate court was able to consider both properly and improperly admitted evidence on a sufficiency of the evidence review. *Means v. State*, 2015 Ark. App. 643, 476 S.W.3d 168 (2015).

Evidence was sufficient to convict defendant of unlawful discharge of a firearm from a motor vehicle and battery as the victim suffered a serious physical injury. The victim testified that he received three gunshot wounds, was hospitalized, lost a kidney, and suffered further infections as a result of the wound; and the victim's injury caused protracted impairment of his health as the victim testified about the complications that resulted in infection and required him to return to the hospital, receive antibiotics, and have drainage tubes placed in his body. *Johnson v. State*, 2017 Ark. App. 71, 510 S.W.3d 298 (2017).

Evidence was sufficient to convict defendant of aggravated robbery and first-degree battery because defendant, armed with a deadly weapon, along with the accomplice, forced his way into the victim's home and demanded marijuana, shot the victim when he did not produce marijuana, and stole a pair of the victim's shoes and a box of shotgun shells; the jury could conclude that a backpack and a cell phone belonged to defendant, or at least were used by him, and connected him with the shooting; and substantial evidence supported a determination that the juve-

nile was not an accomplice, that his testimony tended to connect defendant to the robbery and battery, and that his testimony independently established the commission of those crimes. *West v. State*, 2017 Ark. App. 416, 530 S.W.3d 355 (2017).

Evidence was sufficient to convict defendant of first-degree battery as the finding that defendant fired the shots with the purpose of causing physical injury to someone was supported by substantial evidence; the testimony established that defendant entered the office, verbally threatened to kill the victims, fired his weapon repeatedly, shot his employer in the head, chased at least one of the victims out of the office while shooting at him, and was standing in the parking lot still armed with the gun when the officers arrived. *Martinez v. State*, 2018 Ark. App. 187, 545 S.W.3d 264 (2018).

In a circumstantial evidence case, defendant's conviction for first-degree battery related to an infant's injuries had to be reversed because the State failed to exclude every other reasonable hypothesis; on the evidence, it was just as reasonable to conclude that the infant's mother was the perpetrator since defendant and the mother both had access to the infant. *Snow v. State*, 2018 Ark. App. 612, 568 S.W.3d 290 (2018).

Federal Law.

Defendant's prior conviction of first-degree battery under subdivision (a)(8) of this section was a violent felony under the force clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i); defendant was charged with purposefully causing physical injury to a person with a firearm. *United States v. Eason*, 907 F.3d 554 (8th Cir. 2018).

Instructions.

Where a defendant appealed his conviction for first-degree battery, a trial court abused its discretion in failing to instruct the jury on third-degree battery since there was some evidence to support such an instruction. The defendant testified that he did not mean to drop the infant on her head and that it was an accident, and an expert offered his opinion that a baby's skull could be fractured by a fall such as the one described by the defendant. *Washington v. State*, 2014 Ark. App. 122 (2014).

Defendant, convicted of first-degree battery (law enforcement officer), failed to show that the jury instruction violated the principle established in *Apprendi* because the jury was specifically instructed that it was required to make a finding about the circumstances of the offense as directed on the verdict form if it found defendant guilty of battery in the first degree; the trial court then read the verdict form verbatim to the jury, specifically instructing that the jury was required to indicate whether it found beyond a reasonable doubt that the victim was a law enforcement officer. *Boose v. State*, 2017 Ark. App. 302 (2017).

Trial court did not abuse its discretion in refusing to give a proffered jury instruction that defendant knew or reasonably should have known he was shooting at a law enforcement officer because the plain language of this section does not require the State to prove that an offender knew or should have known that his or her victim was a law enforcement officer. *Boose v. State*, 2017 Ark. App. 302 (2017).

Defendant's contention that the trial court's refusal to include his proffered jury instruction was a violation of his due-process rights was unsupported by any citation to authority applicable to the facts. *Boose v. State*, 2017 Ark. App. 302 (2017).

Multiple Convictions.

Trial court properly denied appellant postconviction relief because he failed to show a double-jeopardy violation arising out of the charges for commission of a terroristic act, criminal attempt to commit first-degree battery, and aggravated assault; there were six separate criminal violations resulting from six separate impulses in the firing of six separate shots. *Lee v. State*, 2017 Ark. 337, 532 S.W.3d 43 (2017).

Physical Injury.

Evidence was sufficient to show that a baby sustained a serious physical injury for purposes of subdivision (a)(9) of this section where the medical testimony described the skull fracture, the pain potentially caused by the subdural bleeding, and the greater risk of developing further complications. *Suchey v. State*, 2016 Ark. App. 225, 490 S.W.3d 320 (2016).

Violation of Probation.

Circuit court properly revoked defendant's probation and sentenced him to four years because he committed the new offense of first-degree battery; although the victim testified that he was high on drugs on the night he was attacked, that he believed his dog speaks to him, and that he believed he had been diagnosed with some form of mental illness, the victim's unrefuted testimony was that when he refused to shake defendant's hand, defendant stabbed him in the chest, which resulted in a punctured lung and a five-day hospital stay. *Turner v. State*, 2017 Ark. App. 682, 537 S.W.3d 299 (2017).

Violation of Suspension.

State clearly showed that defendant was significantly delinquent in paying his court-ordered restitution, and he offered no reasonable excuse, plus, although only one violation was necessary to revoke the suspension, the State further showed that defendant violated his conditions by committing first-degree battery, and thus the decision to revoke defendant's suspended sentence was not clearly against the preponderance of the evidence. *Sherril v. State*, 2014 Ark. App. 411, 439 S.W.3d 76 (2014).

5-13-202. Battery in the second degree.

(a) A person commits battery in the second degree if:

(1) With the purpose of causing physical injury to another person, the person causes serious physical injury to another person;

(2) With the purpose of causing physical injury to another person, the person causes physical injury to another person by means of a deadly weapon other than a firearm;

(3) The person recklessly causes serious physical injury to another person:

(A) By means of a deadly weapon; or

(B) While operating or in actual physical control of a motor vehicle or motorboat if at the time:

(i) The person is intoxicated; or

(ii) The alcohol concentration in the person's breath or blood is eight-hundredths (0.08) or more based upon the definition of alcohol concentration in § 5-65-204; or

(4) The person knowingly, without legal justification, causes physical injury to or incapacitates a person he or she knows to be:

(A)(i) A law enforcement officer, firefighter, code enforcement officer, or employee of a correctional facility while the law enforcement officer, firefighter, code enforcement officer, or employee of a correctional facility is acting in the line of duty.

(ii) As used in this subdivision (a)(4)(A):

(a)(1) "Code enforcement officer" means an individual charged with the duty of enforcing a municipal code, municipal ordinance, or municipal regulation as defined by a municipal code, municipal ordinance, or municipal regulation.

(2) "Code enforcement officer" includes a municipal animal control officer; and

(b) "Employee of a correctional facility" includes a person working under a professional services contract with the Division of Correction, the Division of Community Correction, or the Division of Youth Services;

(B) A teacher or other school employee while acting in the course of employment;

(C) An individual sixty (60) years of age or older or twelve (12) years of age or younger;

(D) An officer or employee of the state while the officer or employee of the state is acting in the performance of his or her lawful duty;

(E) While performing medical treatment or emergency medical services or while in the course of other employment relating to his or her medical training:

(i) A physician;

(ii) A person licensed as emergency medical services personnel, as defined in § 20-13-202;

(iii) A licensed or certified healthcare professional; or

(iv) Any other healthcare provider; or

(F) An individual who is incompetent, as defined in § 5-25-101.

(b)(1) Battery in the second degree under subdivision (a)(3)(B) of this section is a Class C felony.

(2) Otherwise, battery in the second degree is a Class D felony.

(c) As used in this section, “motorboat” means the same as defined in § 5-65-102.

History. Acts 1975, No. 280, § 1602; 1981, No. 877, § 1; 1983, No. 12, § 1; A.S.A. 1947, § 41-1602; Acts 1995, No. 1173, § 1; 1995, No. 1305, § 2; 1995, No. 1338, § 1; 1997, No. 207, § 1; 1997, No. 878, § 1; 1999, No. 389, § 1; 2003, No. 66, § 1; 2007, No. 827, § 27; 2009, No. 344, § 1; 2009, No. 689, § 1; 2011, No. 1120, § 6; 2011, No. 1168, § 1; 2013, No. 429, § 1; 2015, No. 104, §§ 1, 2; 2017, No. 333, § 1; 2019, No. 783, § 1; 2019, No. 910, § 667.

Amendments. The 2015 amendment

inserted “or motorboat” in (a)(3)(B); and added (c).

The 2017 amendment substituted “§ 5-65-102” for “§ 5-76-101 [repealed]” in (c).

The 2019 amendment by No. 783 added (b)(1) and redesignated former (b) as (b)(2); added “Otherwise” in (b)(2).

The 2019 amendment by No. 910 substituted “Division of Correction” for “Department of Correction” and “Division of Community Correction” for “Department of Community Correction” in (a)(4)(A)(ii)(b).

CASE NOTES

ANALYSIS

Crime of Violence.

Deadly Weapon.

Evidence.

Healthcare Provider.

Lesser Included Offenses.

Crime of Violence.

Where a defendant appealed his 110-month sentence for violating 18 U.S.C. § 922(g)(1), his battery conviction under subdivision (a)(4) of this section was for a crime of violence and the district court correctly calculated his base offense level under U.S. Sentencing Guidelines Manual § 2K2.1. *United States v. Rice*,

813 F.3d 704 (8th Cir.), cert. denied, — U.S. —, 137 S. Ct. 59, 196 L. Ed. 2d 59 (2016).

Where a defendant appealed his 15-year sentence for violating 18 U.S.C. § 922(g)(1), he qualified as an armed career criminal under 18 U.S.C. § 924(e)(1); he acknowledged two qualifying prior convictions, and the lower court did not err in concluding that defendant’s conviction for second-degree battery under subdivision (a)(2) of this section was a violent felony and thus a third qualifying offense. *United States v. Winston*, 845 F.3d 876 (8th Cir.), cert. denied, — U.S. —, 137 S. Ct. 2201, 198 L. Ed. 2d 265, 2017 U.S. LEXIS 3513 (U.S. May 30, 2017).

Deadly Weapon.

Evidence was sufficient to find that the object used in a stabbing was a deadly weapon in the manner of its use, even though it was not identifiable, because it was sharp, pointy, and when stabbed at the victim was capable of penetrating his torso and puncturing his lung. *Medlock v. State*, 2013 Ark. App. 609 (2013).

Evidence.

Defendant's actions in following the victims, driving toward the victims in his car at full speed, and running from the scene after hitting one of the victims constituted substantial evidence supporting his second-degree battery conviction. *Guana-Lopez v. State*, 2014 Ark. App. 204 (2014).

Healthcare Provider.

In a bench trial, the State sufficiently proved each necessary element of second-degree battery under subdivision (a)(4)(E)(iv) of this section and thus the circuit court did not err in denying defendant's motion to dismiss; the victim, a

hospice nursing assistant, returned to the decedent's house to provide postmortem care, and her supervisor testified that the victim's employment duties were to take care of the decedent and provide comfort to the family, and thus she was in the course of "other employment relating to her medical training" when defendant struck her. *Warren v. State*, 2019 Ark. App. 33, 567 S.W.3d 105 (2019).

Lesser Included Offenses.

Revocation of defendant's suspended sentence was appropriate; even though the evidence did not establish any physical injury to the victim to support the allegation of second-degree battery on a law enforcement officer, the Court of Appeals without invitation held that the evidence was sufficient to support the lesser-included offense of second-degree assault under § 5-13-206. *Caldwell v. State*, 2018 Ark. App. 588, 565 S.W.3d 539 (2018).

Cited: *Washington v. State*, 2014 Ark. App. 122 (2014).

5-13-203. Battery in the third degree.

CASE NOTES

ANALYSIS

Evidence.

Instructions.

Physical Injury.

Evidence.

Suspension of an earlier sentence was properly revoked because defendant committed domestic battery in the third degree where an infant child suffered an arm fracture in defendant's care, and a medical examination revealed healing fractures other places; moreover, there was evidence that other injury incidents had occurred while the child was in defendant's care, and there was testimony that defendant was too rough with the child. The standard for reckless was what a reasonable person in the circumstances would have observed. *Singletary v. State*, 2013 Ark. App. 699 (2013).

Instructions.

Where a defendant appealed his conviction for first-degree battery, a trial court abused its discretion in failing to instruct

the jury on third-degree battery since there was some evidence to support such an instruction. The defendant testified that he did not mean to drop the infant on her head and that it was an accident, and an expert offered his opinion that a baby's skull could be fractured by a fall such as the one described by the defendant. *Washington v. State*, 2014 Ark. App. 122 (2014).

Physical Injury.

Trial court did not abuse its discretion by failing to give a proffered jury instruction on third degree battery because the only rational conclusion was that the victim of a shooting suffered a serious physical injury, as opposed to a physical injury; an officer described the gunshot as a fairly severe wound, stated that there was a substantial amount of bleeding, and said that he was concerned that the victim would die before the ambulance arrived. *Bennett v. State*, 2014 Ark. App. 624, 447 S.W.3d 602 (2014).

Cited: *Mosley v. State*, 2016 Ark. App. 353, 499 S.W.3d 226 (2016).

5-13-204. Aggravated assault.

(a) A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely:

(1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person;

(2) Displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person; or

(3) Impedes or prevents the respiration of another person or the circulation of another person's blood by applying pressure on the chest, throat, or neck or by blocking the nose or mouth of the other person.

(b) Aggravated assault is a Class D felony.

(c) The provisions of this section do not apply to:

(1) A law enforcement officer acting within the scope of his or her duty; or

(2) A person acting in self-defense or the defense of a third party.

History. Acts 1975, No. 280, § 1604; A.S.A. 1947, § 41-1604; Acts 2003, No. 1113, § 1; 2009, No. 332, § 1; 2019, No. 243, § 1.

Amendments. The 2019 amendment inserted "chest" in (a)(3).

CASE NOTES

ANALYSIS

Acts Constituting Assault.
Construction With Other Law.
Double Jeopardy.
Evidence.
—Pointing a Gun.
Intent.
Preservation for Review.

Acts Constituting Assault.

Defendant's actions in following the victims, driving toward the victims in his car at full speed, and running from the scene after hitting one of the victims constituted substantial evidence supporting his aggravated assault conviction. *Guana-Lopez v. State*, 2014 Ark. App. 204 (2014).

Construction With Other Law.

Defendant's Arkansas aggravated assault conviction was not a violent felony under the federal Armed Career Criminal Act's force clause, 18 U.S.C. § 924(e), because subdivision (a)(1) of this section only required the government to prove conduct that created a substantial danger of death or serious physical injury. *United States v. Jordan*, 812 F.3d 1183 (8th Cir. 2016).

Double Jeopardy.

Trial court properly denied appellant postconviction relief because he failed to show a double-jeopardy violation arising out of the charges for commission of a terroristic act, criminal attempt to commit first-degree battery, and aggravated assault; there were six separate criminal violations resulting from six separate impulses in the firing of six separate shots. *Lee v. State*, 2017 Ark. 337, 532 S.W.3d 43 (2017).

Evidence.

There was sufficient evidence to support the revocation of defendant's suspended sentences based on his commission of aggravated because he purposely engaged in conduct that created a substantial danger of serious physical injury to the victim and there was no requirement that he verbally convey his intentions to the victim or that the knife be produced where the victim identified the use of a knife as a weapon, and his credibility with regard to it was properly determined by the fact finder. *Flurry v. State*, 2014 Ark. App. 128 (2014).

Defendant admitted to shooting his gun multiple times in the vicinity of his wife and his friend, and that only his friend

was injured did not negate the danger of death or injury that his wife was exposed to in this situation; substantial evidence supported defendant's conviction of aggravated assault. *Frazier v. State*, 2014 Ark. App. 191 (2014).

Trial court did not err in denying appellant's motion for a directed verdict on an aggravated assault charge where, after realizing that he would be unable to escape from two police officers pursuing him, he turned towards one officer and held a knife in a threatening manner, the officer was able to strike appellant with his baton and take away the knife, and thus, appellant was close enough to the officer to cause serious physical injury. *Freeman v. State*, 2016 Ark. App. 36, 480 S.W.3d 886 (2016).

Sufficient evidence supported defendant's aggravated assault conviction, given that defendant had beaten the victim repeatedly while she was bound in such a position that she had to hold her head up in order not to choke, photographs depicted serious injuries to her face, head, and neck, and defendant threatened to kill her and talked about disposing of her body. *Reynolds v. State*, 2016 Ark. 214, 492 S.W.3d 491 (2016).

Substantial evidence supported defendant's aggravated-assault convictions because defendant pointed a gun at a customer inside a bank and fired a shot at close range before exiting the bank and firing a shot toward a second victim; that conduct created a substantial danger of death or serious physical injury to the victims. *Hamilton v. State*, 2017 Ark. App. 447, 526 S.W.3d 859 (2017).

There was sufficient evidence that the juvenile committed aggravated assault where the juvenile's flight led the officers to a wet, slippery concrete drainage canal that was poorly lit, the juvenile had his hand on a gun in his pocket as he was continuing to resist arrest and physically tussling with the officer trying to subdue him, the juvenile continued to struggle against an officer who was already suffering from a significant arm injury due to a slip and fall, the officer did not draw his weapon, and his injury made him vulnerable to the potential of being shot while trying to wrest the gun from the juvenile. *J.N.A. v. State*, 2017 Ark. App. 502, 532 S.W.3d 582 (2017).

Evidence was sufficient to convict defendant of aggravated assault because the State introduced sufficient proof that defendant acted under circumstances manifesting extreme indifference to the value of human life where he repeatedly delivered blows to the victim's face and choked her into unconsciousness. Even if the appellate court credited defendant's argument that the State failed to prove that he engaged in conduct that created a substantial danger of death or serious physical injury, the State did not fail to prove that he impeded or prevented the respiration of another person or circulation of another person's blood as the victim testified that defendant choked her until she was unconscious. *Harris v. State*, 2018 Ark. App. 219, 547 S.W.3d 709 (2018).

Sufficient evidence supported defendant's aggravated assault conviction given testimony that defendant pulled out a gun and waved it at the victim's father when trying to take the victim's child and threatened to shoot the father (no-merit brief). *Kelley v. State*, 2019 Ark. App. 71, 568 S.W.3d 801 (2019).

—Pointing a Gun.

Evidence was sufficient to convict defendant of three counts of aggravated assault as pointing a loaded handgun at someone was enough to create a substantial danger of death or serious physical injury. *Martinez v. State*, 2018 Ark. App. 187, 545 S.W.3d 264 (2018).

Intent.

Trial counsel was not ineffective for failing to make an appropriate motion for directed verdict because appellant failed to show that the motion, even if properly preserved for appeal, would have been meritorious; it was not necessary for the State to demonstrate he aimed the gun at the individual occupants of the house or intended to shoot them because firing the gun in the direction of the victim and the home placed the victim and the occupants' lives in danger and demonstrated the requisite indifference. *Lee v. State*, 2017 Ark. 337, 532 S.W.3d 43 (2017).

Preservation for Review.

Because defendant, who was convicted under subdivision (a)(2) of this section, failed to raise the arguments he made on appeal to the circuit court, his arguments that the evidence was insufficient to sup-

port his convictions were not preserved for review; neither of the arguments defendant made on appeal was the argument he

made to the circuit court in his directed-verdict motions. *Sampson v. State*, 2018 Ark. App. 160, 544 S.W.3d 580 (2018).

5-13-205. Assault in the first degree.

CASE NOTES

Evidence Sufficient.

Evidence was sufficient to convict defendant of first-degree assault because, after defendant pursued the victim into his home and cornered him, the victim pulled his gun, and defendant pulled his gun and pointed it at the victim as he was leaving the victim's home. Defendant was not entitled to the defense of justification, even if his argument had been preserved for re-

view, as he created the situation with the victim because he sat in wait for the victim to return home; upon his return, defendant confronted him, attacked him, and continued to pursue him into his home; and the victim pulled a gun on defendant when he was backed into a corner and scared. *Petty v. State*, 2017 Ark. App. 347 (2017).

5-13-206. Assault in the second degree.

CASE NOTES

Lesser Included Offenses.

While the juvenile was charged with second-degree terroristic threatening and the circuit court in effect sua sponte amended the charge when it found the juvenile guilty of second-degree assault, and second-degree assault is not a lesser-included offense of second-degree terroristic threatening, the juvenile failed to raise the due process issue at the circuit court level and therefore failed to preserve the issue for appellate review. *I.K. v. State*, 2018 Ark. App. 584, 564 S.W.3d 579 (2018).

Revocation of defendant's suspended sentence was appropriate; even though the evidence did not establish any physical injury to the victim to support the allegation of second-degree battery on a law enforcement officer under § 5-13-202, the Court of Appeals without invitation held that the evidence was sufficient to support the lesser-included offense of second-degree assault. *Caldwell v. State*, 2018 Ark. App. 588, 565 S.W.3d 539 (2018).

5-13-207. Assault in the third degree.

CASE NOTES

Evidence.

Juvenile's adjudications for two counts of third-degree assault were supported by the evidence, as one victim testified that the juvenile threatened to hit her on her buttocks so hard that it would hurt, and then he did hit her so hard that it made her scream and left a hand-shaped bruise, and the other victim testified that the

juvenile grabbed her hoodie, pulled it away from her chest, and reached his hand into her bra, and this victim jerked away, pushed her hoodie back to her chest, and went home. *P.J. v. State*, 2019 Ark. App. 315, 578 S.W.3d 307 (2019).

Cited: *Mosley v. State*, 2016 Ark. App. 353, 499 S.W.3d 226 (2016).

5-13-210. Introduction of controlled substance into body of another person.

RESEARCH REFERENCES

Ark. L. Rev. Kyle Kennedy, Comment: Legislative Proposal to Create an Appropriate Balance, 70 Ark. L. Rev. 167 (2017).
 How to Combat Prenatal Substance Abuse While Also Protecting Pregnant Women: A

CASE NOTES

ANALYSIS

Active Process.
 Unborn Child.

Active Process.

This section does not expressly criminalize the passive bodily processes that result in a mother’s use of a drug entering her unborn, or newborn child’s system; “otherwise introduced” must be interpreted to refer to an active process. Therefore, defendant’s conviction for introduction of a controlled substance into the body of another person could not stand where it was based on the passing of drugs from the mother to the child via the umbilical cord; the record was completely devoid of any evidence that defendant

directly introduced methamphetamine into her baby’s system by causing the child to ingest or inhale it. *Arms v. State*, 2015 Ark. 364, 471 S.W.3d 637 (2015).

Unborn Child.

Arkansas Criminal Code expressly limits criminalizing conduct with respect to an unborn child to homicide offenses, and even then, does not allow a mother to be charged or convicted of any homicide offense while her child is in utero. Therefore, a conviction under this section for introduction of a controlled substance into the body of another person based on defendant’s ingestion of drugs while pregnant could not stand. *Arms v. State*, 2015 Ark. 364, 471 S.W.3d 637 (2015).

5-13-211. Aggravated assault upon a law enforcement officer or an employee of a correctional facility.

(a) A person commits aggravated assault upon a law enforcement officer or an employee of a correctional facility if:

(1) Under circumstances manifesting extreme indifference to the personal hygiene of the law enforcement officer or employee of the correctional facility, the person purposely engages in conduct that creates a potential danger of infection to the law enforcement officer or an employee of any state or local correctional facility while the law enforcement officer or employee of the state or local correctional facility is engaged in the course of his or her employment by causing a person whom the actor knows to be a law enforcement officer or employee of the state or local correctional facility to come into contact with saliva, blood, urine, feces, seminal fluid, or other bodily fluid by purposely throwing, tossing, expelling, or otherwise transferring the fluid or material; or

(2) He or she knowingly discharges a firearm with a purpose to cause serious physical injury or death to a law enforcement officer or an employee of a correctional facility while the law enforcement officer or employee of a correctional facility is acting within the scope of his or her official duties and the person:

(A) Is in custody as a result of a felony conviction;

(B) Is unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(C) Has a felony conviction for a felony offense which contained as an element the use or threat of violence against another person or the creation of a substantial risk of death or serious physical injury to another person;

(D) Knowingly creates a substantial risk of serious physical injury or death to a person other than the law enforcement officer or the employee of a correctional facility;

(E) Causes the death of more than one (1) person;

(F) Is acting with a purpose to avoid or prevent an arrest or to escape from custody;

(G) Is acting with a purpose to obtain a pecuniary gain; or

(H) Is acting with a purpose to disrupt or hinder the lawful exercise of any government or political function.

(b) Aggravated assault upon a law enforcement officer or an employee of a correctional facility is:

(1) A Class D felony under subdivision (a)(1) of this section; or

(2) A Class Y felony under subdivision (a)(2) of this section.

History. Acts 1997, No. 1235, § 1; 2003, No. 1271, § 1; 2011, No. 277, § 1; 2017, No. 367, § 5.

Amendments. The 2017 amendment deleted “certified” preceding “law enforcement officer” in the section heading and throughout the section; redesignated for-

mer (a) as the introductory language of (a) and (a)(1); added (a)(2); redesignated former (b) as the present introductory language of (b) and (b)(1); added “under subdivision (a)(1) of this section” in (b)(1); and added (b)(2).

CASE NOTES

Evidence Sufficient.

Deputy’s testimony that defendant was infected with AIDS, was angry and violent, threatened to infect him with AIDS, repeatedly spit at him, and at one point successfully spit on him, while he had an

open wound on his nose, was sufficient evidence to support defendant’s conviction for aggravated assault upon a law enforcement officer. *Wright v. State*, 2016 Ark. App. 404, 499 S.W.3d 683 (2016).

SUBCHAPTER 3 — TERRORISTIC THREATS AND ACTS

SECTION.

5-13-301. Terroristic threatening.

5-13-302. Threatening to commit act of mass violence on school property.

5-13-301. Terroristic threatening.

(a)(1) A person commits the offense of terroristic threatening in the first degree if:

(A) With the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person; or

(B) With the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty.

(2) Terroristic threatening in the first degree is a Class D felony.

(b)(1) A person commits the offense of terroristic threatening in the second degree if, with the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to another person.

(2) Terroristic threatening in the second degree is a Class A misdemeanor.

(c)(1)(A) Upon pretrial release of the defendant, a judicial officer shall:

(i) Enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure; and

(ii) Give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) The no contact order under subdivision (c)(1)(A) of this section remains in effect during the pendency of any appeal of a conviction under this section.

(C) The judicial officer or prosecuting attorney shall provide a copy of the no contact order under subdivision (c)(1)(A) of this section to the victim and arresting agency without unnecessary delay.

(2) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter orders consistent with § 5-2-327 or § 5-2-328, or both.

History. Acts 1975, No. 280, § 1608; 1979, No. 753, § 1; A.S.A. 1947, § 41-1608; Acts 1993, No. 379, § 4; 1993, No. 388, § 4; 1993, No. 1189, § 3; 1995, No. 1302, § 2; 2017, No. 472, § 18.

Amendments. The 2017 amendment substituted “orders consistent with § 5-2-327 or § 5-2-328, or both” for “such orders as are consistent with § 5-2-305” in (c)(2).

CASE NOTES

ANALYSIS

Evidence.

—Admission.

—Sufficient.

Failure to Preserve for Appeal.

Jury Instructions.

Sentence.

Evidence.

Evidence was sufficient to revoke defendant’s probation on the basis of terroristic threatening because the victim testified that he heard a noise outside his bedroom window, he received a phone call from defendant threatening to cut his throat with the same knife he used to cut his window screen, and while the screen had

not been cut, it had been tampered with and was loose in its frame. *Coupey v. State*, 2013 Ark. App. 446 (2013).

Record contained substantial evidence that defendant had the intent to commit the crime of terroristic threatening, as he made statements that he would destroy anyone who got in his way, and he tried to call his father to talk him out of “it,” and this particular statement was made after defendant loaded or cocked a rifle while pacing; taken in context, the statements were not innocuous, but given the parties’ volatile relationship, gave rise to the level sufficient to support a conviction of terroristic threatening. *Cauffiel v. State*, 2013 Ark. App. 642 (2013).

Defendant was properly convicted of terroristic threatening because it could not be said on the record that the jury could not reasonably find defendant's threat to kill a judge was in fact intended to terrorize a law firm's secretary or that the trial court abused its discretion in permitting the secretary to testify concerning her state of mind after hearing defendant's threat. *Foshee v. State*, 2014 Ark. App. 315 (2014).

—Admission.

Where cross-examination of the victim at trial revealed that the State's exhibit of text messages between the defendant and victim was incomplete and that the victim had deleted some of the messages, the appellate court did not have to decide whether the circuit court erred in failing to strike the exhibit because any error that existed was harmless given the overwhelming evidence of defendant's guilt that remained. *Farmer v. State*, 2019 Ark. App. 148, 571 S.W.3d 78 (2019).

—Sufficient.

Evidence supported defendant's conviction for having made terroristic threats because defendant broke into the victim's home, broke into the bathroom where the victim retreated, physically assaulted the victim, took the victim's cell phone away and broke it, and threatened that, if the victim had called the police, defendant would kill the victim. *Adams v. State*, 2014 Ark. App. 308, 435 S.W.3d 520 (2014).

There was substantial evidence to support defendant's first-degree-terroristic-threatening conviction, given that the text message defendant sent the victim contained statements that he would "do a 187" on her, which stood for homicide, and he would chop up her parents' house with bullets, and he would knock her teeth out. *Rodriguez v. State*, 2014 Ark. App. 660, 449 S.W.3d 306 (2014).

Defendant argued that a text also contained derogatory comments directed toward the victim's friend, and thus it constituted evidence of other bad acts that were not relevant and were prejudicial, but this argument was rejected because the comments directed toward the friend also supported the charge of terroristic threatening. *Rodriguez v. State*, 2014 Ark. App. 660, 449 S.W.3d 306 (2014).

Deputy's testimony that defendant threatened to kill him and his family, assault him, and infect him with AIDS, all while defendant was behaving violently and erratically, even kicking the plexiglass barrier in the patrol vehicle so hard it caused the shotgun mount to break and the shotgun to fall on the deputy and injure him, was sufficient to support defendant's conviction for terroristic threatening. *Wright v. State*, 2016 Ark. App. 404, 499 S.W.3d 683 (2016).

Defendant's conviction for terroristic threatening was supported by evidence that defendant threatened to "do" the victim and specifically threatened to kill her. *Armour v. State*, 2016 Ark. App. 612, 509 S.W.3d 668 (2016).

Evidence was sufficient to sustain defendant's conviction for first-degree terroristic threatening under subdivision (a)(1)(A) of this section, where the evidence showed that she chased the victim around their home with a knife and stabbed him multiples times. *Stockstill v. State*, 2017 Ark. App. 29, 511 S.W.3d 889 (2017).

Failure to Preserve for Appeal.

In a case in which a jury convicted defendant on two counts of threatening a judicial officer and one count of terroristic threatening, defendant's challenges to the sufficiency of the evidence against him were not preserved for review. *Radford v. State*, 2018 Ark. App. 89, 538 S.W.3d 894 (2018).

While the juvenile was charged with second-degree terroristic threatening and the circuit court in effect sua sponte amended the charge when it found the juvenile guilty of second-degree assault, and second-degree assault is not a lesser-included offense of second-degree terroristic threatening, the juvenile failed to raise the due process issue at the circuit court level and therefore failed to preserve the issue for appellate review. *I.K. v. State*, 2018 Ark. App. 584, 564 S.W.3d 579 (2018).

Jury Instructions.

Defendant's words and actions clearly showed both that he had a purpose of terrorizing and that he threatened to cause death or serious physical injury; because there was no rational basis for acquitting him of first-degree terroristic

threatening, the trial court did not abuse its discretion in refusing to instruct the jury on the lesser offense of second-degree terroristic threatening. *Campbell v. State*, 2014 Ark. App. 171, 432 S.W.3d 673 (2014).

Sentence.

Because defendant received 15 years for first-degree terroristic threatening, as en-

hanced under § 5-4-501, his sentence was above the statutory range and therefore illegal. *Radford v. State*, 2018 Ark. App. 89, 538 S.W.3d 894 (2018).

Cited: *Ta v. State*, 2015 Ark. App. 220, 459 S.W.3d 325 (2015).

5-13-302. Threatening to commit act of mass violence on school property.

(a) As used in this section:

(1) “Mass violence” means physical injury that a reasonable person would conclude could lead to permanent injury, including without limitation permanent physical injury, permanent mental injury, or permanent emotional injury, or death to two (2) or more people; and

(2) “School” means a:

(A) Public or private daycare or preschool facility;

(B) Public or private school for students in grades kindergarten through twelve (K-12);

(C) Technical institute or postsecondary vocational-technical school; or

(D) Two-year or four-year college or university.

(b) A person commits the offense of threatening to commit an act of mass violence on school property if:

(1) The person knowingly threatens to commit an act of mass violence on school property or at a curricular or extracurricular activity sponsored by a school by any means of communication; and

(2) Places a person or group of persons in a position to reasonably fear for their safety.

(c) Threatening to commit an act of mass violence on school property is a Class C felony.

History. Acts 2019, No. 969, § 1.

5-13-310. Terroristic act.

CASE NOTES

ANALYSIS

Elements.

Multiple Offenses.

Sufficiency of Evidence.

Elements.

Where defendant was convicted of committing a terroristic act but the jury found that defendant did not employ a firearm for purposes of the firearm enhancement,

defendant’s inconsistent-verdict argument was not preserved for review; defendant failed to raise the argument below and no Wicks exception applied. *McDaniel v. State*, 2015 Ark. App. 714 (2015).

Trial counsel was not ineffective for failing to make an appropriate motion for directed verdict because appellant failed to show that the motion, even if properly preserved for appeal, would have been meritorious; there is no requirement in

this section that defendant had to aim with an intention to hit the house rather than the victim, who was outside in front of the house. *Lee v. State*, 2017 Ark. 337, 532 S.W.3d 43 (2017).

Multiple Offenses.

Trial court properly denied appellant postconviction relief because he failed to show a double-jeopardy violation arising out of the charges for commission of a terroristic act, criminal attempt to commit first-degree battery, and aggravated assault; appellant could have been tried and convicted under the statute for the commission of a terroristic act for each shot that he fired. There were six separate criminal violations resulting from six separate impulses in the firing of six separate shots. *Lee v. State*, 2017 Ark. 337, 532 S.W.3d 43 (2017).

Sufficiency of Evidence.

It was defendant's brother who fired the shot that killed the victim, and although defendant claimed the State failed to prove it was his conscious object to assist his brother, the law in Arkansas made no distinction between the criminal liability of a principal and an accomplice; defendant drove around with the stated purpose to assist in hunting down and killing the victim, and thus the evidence supported his convictions of first-degree murder and committing a terroristic act, and the circuit court properly denied his motions for directed verdict. *Starling v. State*, 2015 Ark. App. 429, 468 S.W.3d 294 (2015).

Circuit court did not err in denying defendant's motions for directed verdict because, through the testimony and evi-

dence presented at trial, the jury was apprised of the involvement of the witnesses in the shooting of the victim, and the jury was presented with evidence that defendant chased the victim, blocked the victim's vehicle with defendant's vehicle, and ran up to the victim's car, shooting once into the hood of the car and a second time through the windshield of the car, killing the victim. *Starling v. State*, 2016 Ark. 20, 480 S.W.3d 158 (2016).

Substantial evidence supported a first-degree felony murder conviction and three terroristic-act convictions where the State was only required to prove that defendant in fact shot at the conveyance the victims were occupying regardless of whether he intended to do so, and three eyewitnesses testified that the surviving victim was in the vehicle when defendant shot at it. *Shelton v. State*, 2017 Ark. App. 195, 517 S.W.3d 461 (2017).

Circuit court properly sentenced defendant for capital murder, unlawful discharge of a firearm from a vehicle, terroristic act, and employing a firearm in the commission of a felony because nothing in the capital-murder statute required the State to prove anything regarding the weapon alleged to have been used, the evidence was sufficient for the jury to conclude that defendant shot at an occupiable structure (the victim's home) in an attempt to cause injury to the people standing in front of it, defendant was not prejudiced by the hearsay testimony of a detective regarding a witness's statements to him and the court's failure to give the limiting instruction, and the findings of guilt sufficiently triggered the sentence enhancement. *Martinez v. State*, 2019 Ark. 85, 569 S.W.3d 333 (2019).

CHAPTER 14

SEXUAL OFFENSES

SUBCHAPTER.

1. GENERAL PROVISIONS.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-14-101. Definitions.

5-14-103. Rape.

5-14-110. Sexual indecency with a child.

5-14-113. Sexual extortion.

SECTION.

5-14-124. Sexual assault in the first degree.

5-14-125. Sexual assault in the second degree.

SECTION.

- 5-14-126. Sexual assault in the third degree.
- 5-14-127. Sexual assault in the fourth degree.
- 5-14-128. Registered offender living near school, public park, youth center, daycare, or church or other place of worship prohibited.
- 5-14-132. Registered offender prohibited from entering upon school campus — Exception.

SECTION.

- 5-14-135. Registered offender prohibited from participating in certain Halloween-related activities.
- 5-14-136. Unlawful female genital mutilation of a minor.
- 5-14-137. Registered offender prohibited from recording person under 14 years of age — Unlawful use of recording online.

Effective Dates. Identical Acts 2016 (3rd Ex. Sess.), Nos. 18 and 19, § 2: May 23, 2016. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that protection of our children from sexual predators is of paramount importance; that on March 17, 2016, the Supreme Court held in *State v. Coble* that the language in the current criminal statute of sexual indecency with a child, § 5-14-110, technically did not prescribe criminal liability for at least one (1) act of sexual predation; and that this act is immediately necessary to prohibit acts of sexual predation. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2019, No. 556, § 7: Mar. 26, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the Centers for Disease Control and Prevention currently estimates that five hundred fifty-one (551) girls or women in Arkansas are at the risk of, or have undergone, female genital mutilation; that female genital mutilation is recognized globally as a human rights violation; and that this legis-

lation is immediately needed to help the women of Arkansas as soon as possible. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto”.

Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncoded sections of this act preceding the emergency clause titled ‘Funding and classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-14-101. Definitions.

As used in this chapter:

(1) “Deviate sexual activity” means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of a person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of a person by any body member or foreign instrument manipulated by another person;

(2) “Forcible compulsion” means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person;

(3) “Guardian” means a parent, stepparent, legal guardian, legal custodian, foster parent, or any person who by virtue of a living arrangement is placed in an apparent position of power or authority over a minor;

(4)(A) “Mentally defective” means that a person suffers from a mental disease or defect that renders the person:

(i) Incapable of understanding the nature and consequences of a sexual act; or

(ii) Unaware a sexual act is occurring.

(B) A determination that a person is mentally defective shall not be based solely on the person’s intelligence quotient;

(5) “Mentally incapacitated” means that a person is temporarily incapable of appreciating or controlling the person’s conduct as a result of the influence of a controlled or intoxicating substance:

(A) Administered to the person without the person’s consent; or

(B) That renders the person unaware a sexual act is occurring;

(6) “Minor” means a person who is less than eighteen (18) years of age;

(7) “Physically helpless” means that a person is:

(A) Unconscious;

(B) Physically unable to communicate a lack of consent; or

(C) Rendered unaware a sexual act is occurring;

(8) “Public place” means a publicly or privately owned place to which the public or a substantial number of people have access;

(9) “Public view” means observable or likely to be observed by a person in a public place;

(10) “Recording” includes without limitation an image or video;

(11) “Sexual contact” means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female;

(12) “Sexual intercourse” means penetration, however slight, of the labia majora by a penis;

(13) “Sexually explicit conduct” means the same as defined in § 5-27-302; and

(14) “State of nudity” means the same as defined in § 5-26-302.

History. Acts 1975, No. 280, § 1801; 1985, No. 327, § 1; 1985, No. 563, § 1; A.S.A. 1947, § 41-1801; Acts 1995, No. 525, § 1; 2001, No. 1724, § 1; 2009, No. 748, § 7; 2017, No. 664, § 1.

Amendments. The 2017 amendment added the definitions for “Recording”, “Sexually explicit conduct”, and “State of nudity”.

CASE NOTES

ANALYSIS

Deviate Sexual Activity.
Evidence.
Forcible Compulsion.
Guardian.
Penetration.
Sexual Contact.

Deviate Sexual Activity.

In a rape case, an appellate court did not reach the merits of defendant’s sufficiency of the evidence argument because defendant’s argument made before the trial court relating to sexual gratification was significantly different from the argument made on appeal. Even if the argument was considered on appeal, the evidence was sufficient to prove the crime of rape since the five-year-old victim testified that defendant put his hand in her panties and tickled her private part. *Matar v. State*, 2016 Ark. App. 243, 492 S.W.3d 106 (2016).

Victim’s testimony that, when she was seven years old, defendant put his penis in her butt and that he forced her to suck on his penis while they were in the bathtub was sufficient to meet the definition of “deviate sexual activity”. *King v. State*, 2018 Ark. App. 572, 564 S.W.3d 563 (2018).

Evidence.

Evidence was sufficient to convict defendant of rape and sexual assault where both victims testified that defendant penetrated their vaginas with his penis; the credibility of the witnesses was for the jury to decide. Moreover, an officer’s testimony established that defendant was between 17 and 20 years old over the course of time that he sexually abused one of the victims, so the jury could have reasonably concluded that at least two of the sexual assaults occurred after defendant turned 18. *Thompson v. State*, 2015 Ark. App. 275, 461 S.W.3d 368 (2015).

Forcible Compulsion.

Challenge to the sufficiency of the evidence in a rape case would have been without merit because of the overwhelming evidence of guilt; the victim testified that defendant inserted his penis into her vagina against her will, and the DNA evidence identified defendant as the perpetrator. *Burris v. State*, 2015 Ark. App. 126 (2015).

Evidence was sufficient to convict under § 5-14-103 where the victim testified that the juvenile and codefendant had forced her into a fieldhouse and that codefendant had touched her on the inside with his finger while the juvenile restrained her by the waist and grabbed her hands, and there was nothing inherently improbable or physically impossible about the testimony. *K.B. v. State*, 2017 Ark. App. 478, 531 S.W.3d 420 (2017).

In a rape case, the circuit court did not err in denying appellant’s motion for a directed verdict on the issue of forcible compulsion given that it found the victim’s testimony about the incident credible, and her testimony was not so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not have differed about it. *Hillman v. State*, 2019 Ark. App. 89, 569 S.W.3d 372 (2019).

Guardian.

Trial court did not clearly err by rejecting without a hearing defendant’s claim that his trial counsel was ineffective for failing to object to charging language and jury instructions on the ground that the definition of “guardian” found in this section did not specifically include a step-grandparent, because there was sufficient evidence that defendant was both the victim’s guardian and step-grandparent where defendant did not contest the fact that he was the victim’s step-grandfather and the victim had spent a great deal of time at defendant’s home. *McDaniels v.*

State, 2014 Ark. 181, 432 S.W.3d 644 (2014).

Penetration.

In a rape case, the State should not have been allowed to add the charge of second-degree sexual assault to an information at trial; defendant was unfairly surprised because he did not learn that the State intended to amend the information until after he made a motion to dismiss for failure to prove penetration. Defendant was prepared to defend against the essential element of penetration, and the amendment came after the State's witnesses were able to testify about acts that did not go to the elements of the rape charge. *Martinez v. State*, 2014 Ark. App. 182, 432 S.W.3d 689 (2014).

Defendant's claim that there was insufficient evidence of penetration lacked merit; the semen protein found inside the victim's mouth and vaginal canal was matched to either defendant or someone who shared his parental lineage, plus there was also proof that a sperm cell found on the victim matched defendant's personal DNA profile within all scientific certainty. *Sharp v. State*, 2015 Ark. App. 718, 479 S.W.3d 568 (2015).

In a rape case, an appellate court declined to address a challenge to the sufficiency of the evidence due to the lack of specificity in defendant's directed verdict motions; even if the issue had been addressed, a rape victim's testimony alone could have been sufficient to sustain the conviction. The victim gave specific testimony relating to penetration, and defendant was permitted to cross-examine the victim about previous lies. *Tatum v. State*, 2016 Ark. App. 80 (2016).

5-14-102. In general.

Evidence was sufficient to support defendant's rape conviction, given that the minor child alleged penetration when defendant placed a black pole-like object inside her vaginal area, which was red and consistent with sexual abuse as per the nurse practitioner who examined the child, and defendant's polygraph responses in this regard were found to be deceptive. *Thomas v. State*, 2016 Ark. App. 195, 487 S.W.3d 415 (2016).

Sexual Contact.

Evidence was sufficient to convict defendant of second-degree sexual assault because a victim's testimony was substantial evidence to sustain the conviction; even if defendant was checking on the victim's welfare, this did not explain why he touched her breast or put his hands in her pants when she fell asleep in his truck. *Harris v. State*, 2014 Ark. App. 264 (2014).

Evidence was sufficient to convict defendant of second-degree sexual assault as it could be assumed that defendant's sexual contact with the victim was for sexual gratification because he entered the victim's home and touched her breast and vagina while she was in the bathtub. *Holland v. State*, 2017 Ark. App. 49, 510 S.W.3d 311 (2017).

Cited: *Bean v. State*, 2014 Ark. App. 107, 432 S.W.3d 87 (2014); *Europe v. State*, 2015 Ark. App. 460, 468 S.W.3d 792 (2015); *Lowe v. State*, 2016 Ark. App. 389, 500 S.W.3d 176 (2016); *Allen v. State*, 2016 Ark. App. 537, 506 S.W.3d 278 (2016); *Duck v. State*, 2016 Ark. App. 596, 509 S.W.3d 5 (2016); *Bynum v. State*, 2017 Ark. App. 41, 511 S.W.3d 860 (2017); *Wise-man v. State*, 2017 Ark. App. 371 (2017).

CASE NOTES

Affirmative Defenses.

Petitioner was properly placed on the Arkansas Child Maltreatment Central Registry; the administrative hearing was not untimely because the petitioner requested a continuance and the ensuing delay was attributable to him; moreover, the ALJ did not err by failing to consider evidence of an affirmative defense because the petitioner, at the age of eighteen,

engaged in sexual intercourse with a girl who was fourteen, which was sexual abuse, and even though the child testified that she told the petitioner that she was sixteen years old, it was not sufficient to negate the finding of child maltreatment. *Marrufo v. Ark. Dep't of Human Servs.*, 2013 Ark. 323, 429 S.W.3d 210 (2013).

Cited: *Trotter v. State*, 2018 Ark. App. 326, 551 S.W.3d 421 (2018).

5-14-103. Rape.

(a) A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person:

(1) By forcible compulsion;

(2) Who is incapable of consent because he or she is:

(A) Physically helpless;

(B) Mentally defective; or

(C) Mentally incapacitated;

(3)(A) Who is less than fourteen (14) years of age.

(B) It is an affirmative defense to a prosecution under subdivision (a)(3)(A) of this section that the actor was not more than three (3) years older than the victim; or

(4)(A) Who is a minor and the actor is the victim's:

(i) Guardian;

(ii) Uncle, aunt, grandparent, step-grandparent, or grandparent by adoption;

(iii) Brother or sister of the whole or half blood or by adoption; or

(iv) Nephew, niece, or first cousin.

(B) It is an affirmative defense to a prosecution under subdivision (a)(4)(A) of this section that the actor was not more than three (3) years older than the victim.

(b) It is no defense to a prosecution under subdivision (a)(3) or subdivision (a)(4) of this section that the victim consented to the conduct.

(c)(1) Rape is a Class Y felony.

(2) Any person who pleads guilty or nolo contendere to or is found guilty of rape involving a victim who is less than fourteen (14) years of age shall be sentenced to a minimum term of imprisonment of twenty-five (25) years.

(d)(1) A court may issue a permanent no contact order when:

(A) A defendant pleads guilty or nolo contendere; or

(B) All of the defendant's appeals have been exhausted and the defendant remains convicted.

(2) If a judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the case, the judicial officer shall enter orders consistent with § 5-2-327 or § 5-2-328, or both.

(e) A person convicted of rape is subject to § 9-10-121.

History. Acts 1975, No. 280, § 1803; 1981, No. 620, § 12; 1985, No. 281, § 2; 1985, No. 919, § 2; A.S.A. 1947, § 41-1803; Acts 1993, No. 935, § 1; 1997, No. 831, § 1; 2001, No. 299, § 1; 2001, No. 1738, § 1; 2003, No. 1469, § 3; 2006 (1st

Ex. Sess.), No. 5, § 2; 2009, No. 748, § 8; 2013, No. 210, § 2; 2017, No. 472, § 19.

Amendments. The 2017 amendment substituted "orders consistent with § 5-2-327 or § 5-2-328, or both" for "such orders as are consistent with § 5-2-305" in (d)(2).

CASE NOTES

ANALYSIS

Directed Verdict.

—Lesser Included Offenses.

Evidence.

—Admissibility.

—Impeachment.

—Other Crimes, Wrongs, or Acts.

—Pedophile Exception.

—Sufficiency.

—Suppression.

—Testimony of Minor Victims.

Indictment or Information.

Instructions.

Lesser Included Offenses.

Penetration.

Separate Offenses.

“Victim”.

Directed Verdict.**—Lesser Included Offenses.**

Defendant did not preserve a sufficiency of the evidence challenge because defendant’s trial court argument was based on whether an element of rape was proved, but defendant was convicted of the lesser-included offense of second-degree sexual assault; and defendant failed to move for a directed verdict on second-degree sexual assault either by name or by a specific element of the offense. *King v. State*, 2018 Ark. App. 309 (2018).

Evidence.

Evidence was sufficient to convict defendant of rape of his minor stepdaughter because the victim testified that on 15 occasions between August 2011 and March 2012, when the victim was 12 years old, defendant put his fingers in her privates; a child rape victim’s uncorroborated testimony describing penetration could constitute substantial evidence to sustain a conviction of rape; and the rape victim’s testimony need not be corroborated, and scientific evidence was not required. *Woods v. State*, 2013 Ark. App. 739, 431 S.W.3d 343 (2013).

Trial court did not err in finding that the prejudicial value of defendant’s prior child molestation convict was outweighed by its probative value based on the similarities of the current rape charge and the prior child molestation conviction. *Woods v. State*, 2013 Ark. App. 739, 431 S.W.3d 343 (2013).

There were sufficient similarities between the current rape offense and defendant’s 1998 Missouri conviction for first-degree child molestation to satisfy the pedophile exception and to admit evidence of the prior molestation conviction because both victims were his minor stepdaughters at the time of rapes with whom he had lived; he touched the breasts and privates of both victims with his hands; he created opportunities for the abuse by waiting until the victims’ mothers were away and by intentionally isolating them from their siblings; and he threatened both victims not to report the abuse. *Woods v. State*, 2013 Ark. App. 739, 431 S.W.3d 343 (2013).

In a second-degree sexual assault and attempted rape case, a trial court did not abuse its discretion by excluding evidence from the victim’s former classmates because the classmates’ testimony about what the victim did in public would not have been similar to the testimony that the victim gave detailing what defendant did to her. The allegations against defendant did not occur in public places; moreover, the evidence that the victim was the aggressor was not relevant since the victim could not have consented. *Bean v. State*, 2014 Ark. App. 107, 432 S.W.3d 87 (2014).

Substantial evidence supported the finding that defendant raped the victim sometime during 1999, which supported defendant’s rape conviction; it was the jury’s duty to determine the victim’s credibility, and the victim gave great detail about what happened when she was four years old, and as her testimony alone constituted substantial evidence, the circuit court properly denied his motion for a directed verdict. *T.N. v. State*, 2014 Ark. App. 186 (2014).

Evidence was sufficient to convict defendant of rape and sexual assault where both victims testified that defendant penetrated their vaginas with his penis; the credibility of the witnesses was for the jury to decide. Moreover, an officer’s testimony established that defendant was between 17 and 20 years old over the course of time that he sexually abused one of the victims, so the jury could have reasonably concluded that at least two of the sexual

assaults occurred after defendant turned 18. *Thompson v. State*, 2015 Ark. App. 275, 461 S.W.3d 368 (2015).

—Admissibility.

Trial court did not err in refusing to admit the alleged testimony of the victim under Ark. R. Evid. 804(b)(5); the statement that another man put his finger in a hole in her jeans, which bothered her, was found not to carry substantial guarantees of trustworthiness, and there appeared to be little if any probative value to the evidence, as whether the man made the advance was not material to the question of whether the victim was raped and if defendant was the perpetrator, and DNA evidence completely excluded the man as a source of the semen found on the victim's body. *Sharp v. State*, 2015 Ark. App. 718, 479 S.W.3d 568 (2015).

Rape-shield statute, § 16-42-101, was intended to protect victims from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury; in this case, evidence that the victim was asking defendant for sex, offering him oral sex, attempting to undo his shorts, and touching his penis through his shorts, all within approximately 10 minutes of penetration, was conduct related to the charges pending and therefore relevant to the issue of consent, such that excluding the evidence was prejudicial. *Herren v. State*, 2018 Ark. App. 528, 563 S.W.3d 606 (2018).

—Impeachment.

Because theft crimes involve dishonesty and are automatically admissible for impeachment purposes, it was unnecessary for defendant to proffer the factual circumstances underlying one victim's conviction, and the circuit court abused its discretion by refusing to admit this evidence; the error was not harmless because the case against defendant rested solely on the victims' credibility, and his three rape convictions were reversed and remanded for a new trial (sub. op. on reh'g). *Rogers v. State*, 2018 Ark. 309, 558 S.W.3d 833 (2018).

—Other Crimes, Wrongs, or Acts.

In a rape case, the trial court did not abuse its discretion in permitting testimony under Ark. R. Evid. 404(b) regarding two prior alleged rapes of two other victims. The trial court found enough

similarities between the incidents to make the testimony relevant as evidence of defendant's intent, motive, or plan; and while the evidence might have been prejudicial, its probative value was not outweighed by the danger of unfair prejudice under Ark. R. Evid. 403. *Carter v. State*, 2019 Ark. App. 57, 568 S.W.3d 788 (2019).

—Pedophile Exception.

Circuit court did not abuse its discretion when it admitted a witness's testimony under the pedophile exception because the testimony established a sufficient degree of similarity with the accusations made in the case that defendant raped his daughter; the admission of the evidence helped to show that defendant's impulses and behavior were far outside the expected range of a normal father. *Duvall v. State*, 2018 Ark. App. 155, 544 S.W.3d 106 (2018).

No abuse of discretion occurred by admitting a witness's testimony under the pedophile exception because the testimony was independently relevant to the unique signature and methods defendant used to plan his assaults; the victim's testimony and the witness's testimony showed similarities in that defendant had the proclivity to lure and sexually violate young girls, he made efforts to be alone with them, he showed sexually explicit videos, and he had a planned method for obtaining oral sex. *Duvall v. State*, 2018 Ark. App. 155, 544 S.W.3d 106 (2018).

Circuit court did not abuse its discretion by admitting a witness's testimony under the pedophile exception because the similarities in defendant's conduct towards the victim and the witness, who were of very similar ages, demonstrated a depraved sexual instinct. *Duvall v. State*, 2018 Ark. App. 155, 544 S.W.3d 106 (2018).

—Sufficiency.

Trial court properly denied defendant's motion for directed verdict on the charges of rape, as substantial evidence, including the victim's testimony that defendant forced him to submit to oral sex on several occasions and penetrated him anally, was presented to the jury. *Jeffries v. State*, 2014 Ark. 239, 434 S.W.3d 889 (2014).

Evidence, including the victim's testimony that the inmate engaged in sexual intercourse with the victim, the inmate's

daughter, when she was less than 18, was sufficient to support defendant's rape conviction. *Chunestudy v. State*, 2014 Ark. 345, 438 S.W.3d 923 (2014).

Sufficient evidence supported defendant's rape conviction because (1) the facts established at trial supported the conviction, and (2) defendant's explanation of how defendant's semen was found on a victim was improbable. *Ward v. State*, 2014 Ark. App. 408, 439 S.W.3d 56 (2014).

Defendant was properly found to be the 17-year-old victim's guardian and convicted of rape because, while he did not live with her custodial parent, he was in a position of apparent power or authority over her where her contact with him was as a result of his living arrangement with her mother, defendant was responsible for the victim's care while her mother was away at work, and the victim testified that when defendant asked her to remove her clothes, she did what she was told to do. *Malone v. State*, 2014 Ark. App. 585, 446 S.W.3d 197 (2014).

Challenge to the sufficiency of the evidence in a rape case would have been without merit because of the overwhelming evidence of guilt; the victim testified that defendant inserted his penis into her vagina against her will, and the DNA evidence identified defendant as the perpetrator. *Burris v. State*, 2015 Ark. App. 126 (2015).

Evidence was sufficient to support defendant's conviction on the first count of rape because the victim testified that the first occasion in which she had sexual intercourse with defendant happened after he drove her home from a party, that it happened in the back seat of his vehicle, and that he inserted his sexual organ into her sexual organs; the victim's testimony alone was substantial evidence supporting the conviction; defendant admitted that he knew the victim was 12 years old and that they engaged in sexual intercourse for about five minutes in his vehicle after attending a party; the jury did not believe defendant's version of events; and consent was no defense to the rape of a person who was less than 14 years old. *Hernandez v. State*, 2015 Ark. App. 150 (2015).

Trial court properly convicted defendant of rape and sentenced him as a habitual offender to life imprisonment because there was sufficient evidence of both

alternate theories of the case—forcible compulsion and physical helplessness; there was sufficient evidence that the victim was unconscious (and thus physically helpless) when defendant forcibly engaged in sexual intercourse with her against her will. *Ortega v. State*, 2016 Ark. 372, 501 S.W.3d 824 (2016).

In a rape case, an appellate court declined to address a challenge to the sufficiency of the evidence due to the lack of specificity in defendant's directed verdict motions; even if the issue had been addressed, a rape victim's testimony alone could have been sufficient to sustain the conviction. The victim gave specific testimony relating to penetration, and defendant was permitted to cross-examine the victim about previous lies. *Tatum v. State*, 2016 Ark. App. 80 (2016).

Evidence was sufficient to support defendant's rape conviction, given that the minor child alleged penetration when defendant placed a black pole-like object inside her vaginal area, which was red and consistent with sexual abuse as per the nurse practitioner who examined the child, and defendant's polygraph responses in this regard were found to be deceptive. *Thomas v. State*, 2016 Ark. App. 195, 487 S.W.3d 415 (2016).

Victim's testimony that, when he was 10 or 11 years old, he had been raped by defendant more than 20 times over the course of about a year and the victim's testimony about several specific instances of penetration, which if believed by the jury, established the necessary elements of rape, was sufficient to support defendant's conviction for rape. *Perez v. State*, 2016 Ark. App. 291, 494 S.W.3d 431 (2016).

Substantial evidence supported appellant's conviction for rape under subdivision (a)(3)(A) of this section where the juvenile testified that he placed his mouth on appellant's penis and that appellant put his mouth on the juvenile's penis, which supported the trial court's conclusion that some portion of each person's penis entered the other person's mouth to at least some minimal degree. *Lowe v. State*, 2016 Ark. App. 389, 500 S.W.3d 176 (2016).

Evidence was sufficient to convict defendant of rape under subdivision (a)(2)(B) of this section because the victim's doctor testified that she had a medical history of

some retardation; there was sufficient evidence to support the jury's finding that penetration occurred as a sexual-assault examiner testified that although the victim did not disclose any kind of sexual assault, she found a notch at six o'clock in the victim's hymen, which was abnormal and indicative of sexual assault; and a forensic examiner testified that the blood stains in both defendant's underwear and the victim's underwear contained a mixture of blood from defendant and the victim. *Duck v. State*, 2016 Ark. App. 596, 509 S.W.3d 5 (2016).

Testimony by the minor victims, defendant's cousins, and defendant's admission during a police interrogation to the sexual assault and rape of one victim, constituted sufficient evidence to support defendant's convictions for rape and second-degree sexual assault. The victims both described the sexual acts using their own body-parts terminology, such as "middle spot" and "private part," and explained to which body parts they were referring in terms of "penis" and "anus". *Garcia v. State*, 2017 Ark. App. 457, 530 S.W.3d 862 (2017).

Evidence was sufficient to convict under this section where the victim testified that the juvenile and codefendant had forced her into a fieldhouse and that codefendant had touched her on the inside with his finger while the juvenile restrained her by the waist and grabbed her hands, and there was nothing inherently improbable or physically impossible about the testimony. *K.B. v. State*, 2017 Ark. App. 478, 531 S.W.3d 420 (2017).

Victim's testimony that she was five years old when defendant began raping her and the other victim's testimony that she was nine years old when defendant raped her was sufficient to sustain defendant's convictions for rape under subdivision (a)(3) of this section; there was no requirement that the victims' birthdates must be established at trial. *Friday v. State*, 2018 Ark. 339, 561 S.W.3d 318 (2018).

Evidence was sufficient to convict defendant, age 28, of two counts of rape and two counts of second-degree sexual assault committed against the 13-year-old victim because the victim testified that she was 13 years old, and she described in detail two episodes where defendant engaged in both sexual intercourse and sexual contact with her; the State was not required

to prove forcible compulsion; and mistake of age was not a defense. *Trotter v. State*, 2018 Ark. App. 326, 551 S.W.3d 421 (2018).

Substantial evidence supported defendant's conviction for conspiracy to commit rape because there was evidence that he made a plan with an undercover officer posing as a father to rape his 13-year-old daughter, and defendant took overt steps in furtherance of the plan; the sexually graphic language used by defendant left no doubt that he wanted to have sex with the father's daughter, plus defendant showed up at the meeting place at the appointed time in the vehicle he said he would be driving, and he had two gifts in his vehicle for the daughter. *Frederic v. State*, 2018 Ark. App. 449, 560 S.W.3d 494 (2018).

Victim's testimony that, when she was seven years old, defendant put his penis in her butt and that he forced her to suck on his penis while they were in the bathtub was sufficient to meet the definition of "deviate sexual activity" in § 5-14-101 and the crime of rape. *King v. State*, 2018 Ark. App. 572, 564 S.W.3d 563 (2018).

Substantial evidence supported defendant's rape conviction because the victim testified about sexual encounters with defendant that satisfied the definition of either sexual intercourse or deviate sexual activity and gave graphic descriptions of those encounters and she testified that at least one, if not more, of the encounters happened before her fourteenth birthday. *Goins v. State*, 2019 Ark. App. 11, 568 S.W.3d 300 (2019).

Substantial evidence supported defendant's conviction of rape, given that the victim, a 31-year-old female with learning disabilities, testified that defendant had bitten her, pinned her over the couch, and penetrated her vagina with his fingers and penis, then threatened to kill her if she told anyone, and while her testimony did not require corroboration, a neighbor testified to seeing defendant's car at the victim's home and other witnesses observed the bite mark. *Carter v. State*, 2019 Ark. App. 57, 568 S.W.3d 788 (2019).

—Suppression.

Defendant was in custody when the police interviewed him in his hotel room, given that when he exited his room, he encountered a police officer with his gun

drawn, defendant was immediately searched by another officer, and a third officer positioned himself in front of the door, and the circuit court's ruling that defendant's statements were admissible because he was not in police custody was in error; defendant stated that he had sex with the victim, which eliminated the State's burden of proving that defendant committed the first element of rape, and it could not be said that the error in allowing the statement was harmless. *Morris v. State*, 2016 Ark. App. 546, 506 S.W.3d 299 (2016).

—Testimony of Minor Victims.

In a rape case, an appellate court did not reach the merits of defendant's sufficiency of the evidence argument because defendant's argument made before the trial court relating to sexual gratification was significantly different from the argument made on appeal. Even if the argument was considered on appeal, the evidence was sufficient to prove the crime of rape since the five-year-old victim testified that defendant put his hand in her panties and tickled her private part. *Matar v. State*, 2016 Ark. App. 243, 492 S.W.3d 106 (2016).

Trial court did not err in denying defendant's motions for a directed verdict on both counts of rape because the victim testified at trial that defendant put his middle in her middle; when asked by the State to clarify what middle part she was talking about, the victim stated that defendant put his middle part where he peed from into her middle part where she peed from; the victim testified that defendant molested her when she was 10 years old, which satisfied the statutory element requiring that the victim be less than 14 years old; semen was found on the victim's panties; and a forensic DNA analyst gave expert testimony that established, within all scientific certainty, that the DNA on the victim's panties belonged to defendant. *Allen v. State*, 2016 Ark. App. 537, 506 S.W.3d 278 (2016).

Evidence was sufficient to support defendant's conviction for rape because the victim testified that, when the victim was nine years old, defendant placed defendant's mouth on the victim's penis and that defendant would "go up and down" and that defendant placed defendant's hand on the victim's penis and that defen-

dant's hand would "slightly go up and down slowly". *Ralston v. State*, 2019 Ark. App. 175, 573 S.W.3d 607 (2019).

Indictment or Information.

In a rape case, the State should not have been allowed to add the charge of second-degree sexual assault to an information at trial; defendant was unfairly surprised because he did not learn that the State intended to amend the information until after he made a motion to dismiss for failure to prove penetration. Defendant was prepared to defend against the essential element of penetration, and the amendment came after the State's witnesses were able to testify about acts that did not go to the elements of the rape charge. *Martinez v. State*, 2014 Ark. App. 182, 432 S.W.3d 689 (2014).

Instructions.

Defendant, who was convicted of rape, offered no authority or convincing argument in support of his argument that use of the model verdict form was improper or that the circuit court should have submitted a proffered non-model-verdict form to the jury; defendant contended that interrogatories should have been submitted to the jury in light of the alternate theories of the prosecution's case. *Ortega v. State*, 2016 Ark. 372, 501 S.W.3d 824 (2016).

Lesser Included Offenses.

Juvenile was properly adjudicated delinquent for committing second-degree assault and his due-process rights were not violated because the juvenile confirmed that he engaged in deviate sexual activity by penetrating the victim's anus without touching her, forcible compulsion was an element of both rape and second-degree sexual assault, and the juvenile could not claim surprise by the trial court's true finding as to the lesser-included offense where he was on notice of the greater offense. *X.O.P. v. State*, 2014 Ark. App. 424, 439 S.W.3d 711 (2014).

Circuit court did not abuse its discretion when it declined defendant's request to include a lesser-included-offense jury instruction for second-degree sexual assault; second-degree sexual assault is not a lesser-included offense of rape because it requires proof of two elements that rape does not: defendant's age (18 or over) and defendant's marital status (not married to

the victim). *Hartman v. State*, 2015 Ark. 30, 454 S.W.3d 721 (2015).

Circuit court's mistake in failing to give a lesser-included instruction on second-degree sexual assault in a rape case did not constitute reversible error because there was no rational basis for instructing the jury on the lesser-included offense where a victim testified that defendant inserted his penis into her vagina against her will, and the DNA evidence established that defendant was the perpetrator. *Burris v. State*, 2015 Ark. App. 126 (2015).

Penetration.

Defendant's claim that there was insufficient evidence of penetration lacked merit; the semen protein found inside the victim's mouth and vaginal canal was matched to either defendant or someone who shared his parental lineage, plus there was also proof that a sperm cell found on the victim matched defendant's personal DNA profile within all scientific certainty. *Sharp v. State*, 2015 Ark. App. 718, 479 S.W.3d 568 (2015).

In a case in which defendant was convicted of raping the victim, his cousin, when she was 14 years old, the trial court did not err in denying defendant's motion for directed verdict that challenged the sufficiency of the State's proof of penetration. Although defendant argued that the victim had lied and was not credible, any inconsistencies in the victim's testimony were for the jury to resolve, and it was not an issue for the appellate court; the uncorroborated testimony of the victim that showed penetration was sufficient evidence for a rape conviction; semen was found inside the victim's vagina; and the forensic DNA analyst gave expert testimony that established, within all scientific certainty, that the DNA originated from defendant. *Wiseman v. State*, 2017 Ark. App. 371 (2017).

Substantial evidence supported a rape conviction where an accomplice testified

that defendant had penetrated the victim's vagina with a broomstick, and other witnesses testified that defendant had said so while showing a video of the incident. *Sorum v. State*, 2017 Ark. App. 384, 526 S.W.3d 50 (2017).

Separate Offenses.

Circuit court did not err in denying defendant's motion to dismiss because the second trial did not violate her Fifth Amendment right against double jeopardy; although the victim was the same, each rape charge was the result of a separate impulse separated in point of time and thus the charges were not for the same continuing offense. *Schoolfield v. State*, 2018 Ark. App. 575, 564 S.W.3d 558 (2018).

Because the rape offenses charged in the second prosecution did not occur within the same jurisdiction and venue of the initial prosecution, the offenses were not "related offenses" under Ark. R. Crim. P. 21.3 and dismissal was not required; the requisite inquiry for purposes of Rule 21.3 was not whether the offenses were committed in Craighead County but whether the offenses were committed in the same separate judicial district of Craighead County. *Schoolfield v. State*, 2018 Ark. App. 575, 564 S.W.3d 558 (2018).

"Victim".

Trial court did not err when it referred to the victim as a "victim" during the bench trial; the word "victim" was primarily used by the court during discussions about elements under this section that the State charged defendant with violating. *Graham v. State*, 2019 Ark. App. 88, 572 S.W.3d 29 (2019).

Cited: *Ratchford v. State*, 2015 Ark. 309, 468 S.W.3d 274 (2015); *B.J. v. State*, 2015 Ark. App. 310, 462 S.W.3d 709 (2015).

5-14-110. Sexual indecency with a child.

(a) A person commits sexual indecency with a child if:

(1) Being eighteen (18) years of age or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in:

- (A) Sexual intercourse;
- (B) Deviate sexual activity; or
- (C) Sexual contact;

(2)(A) With the purpose to arouse or gratify a sexual desire of himself or herself or a sexual desire of another person, the person purposely exposes his or her sex organs to another person who is less than fifteen (15) years of age.

(B) It is an affirmative defense to a prosecution under subdivision (a)(2)(A) of this section if the person is within three (3) years of age of the victim;

(3) With the purpose to arouse or gratify a sexual desire of himself or herself or a sexual desire of another person, the person purposely exposes his or her sex organs to a minor, and the actor is:

(A) Employed with the Division of Correction, Division of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(B) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(C) The minor's parent or guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust and authority over the minor;

(4) With the purpose to arouse or gratify his or her sexual desire or a sexual desire of another person, the person, being eighteen (18) years of age or older, causes or coerces a minor to expose his or her sex organs to the actor or another person, and the actor is:

(A) Employed with the Division of Correction, the Division of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(B) Employed by or contracted with the Division of Community Correction, a local law enforcement agency, a court, or a local government and the actor is supervising the minor while the minor is on probation or parole or for any other court-ordered reason;

(C) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(D) The minor's parent or guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor; or

(5) Being eighteen (18) years of age or older, the person causes or coerces another person who is less than fourteen (14) years of age to expose his or her sex organs or the breast of a female with the purpose to arouse or gratify a sexual desire of the actor or another person.

(b) Sexual indecency with a child is a Class D felony.

History. Acts 1975, No. 280, § 1810; A.S.A. 1947, § 41-1810; Acts 1995, No. 550, § 1; 2001, No. 1821, § 1; 2005, No. 1993, § 1; 2007, No. 531, § 1; 2009, No. 748, § 9; 2009, No. 758, § 1; 2016 (3rd Ex. Sess.), No. 18, § 1; 2016 (3rd Ex. Sess.),

No. 19, § 1; 2017, No. 418, § 1; 2019, No. 910, §§ 668, 669.

Amendments. The 2016 (3rd Ex. Sess.) amendment by identical acts Nos. 18 and 19 substituted "of another person" for "of any other person" in (a)(2)(A) and the

introductory language of (a)(3); inserted “parent or” in (a)(3)(C) and (a)(4)(C) [now (a)(4)(D)]; in the introductory language of (a)(4), substituted “the person, being” for “a person who is” and inserted “the actor or”; substituted “the actor” for “himself, herself” in (a)(5); and made stylistic changes.

The 2017 amendment inserted (a)(4)(B) and redesignated the remaining subdivisions accordingly.

The 2019 amendment substituted “Division of Correction” for “Department of Correction” and “Division of Community Correction” for “Department of Community Correction” in (a)(3)(A) and (a)(4)(A), and substituted “Division of Community Correction” for “Department of Community Correction” in (a)(4)(B).

CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Evidence.

Constitutionality.

Appellate court applied strict scrutiny to defendant’s claim that subdivision (a)(1) of this section violated his right to free speech where the texts and social media posts between defendant when he was age 18 and a 14-year-old were not in the record, and there was no recent case law finding that written descriptions of sexual acts constitute unprotected obscenity. *Worsham v. State*, 2019 Ark. App. 65, 572 S.W.3d 1 (2019).

Application of subdivision (a)(1) of this section to defendant under the stipulated facts was unconstitutionally overbroad in suppressing his fundamental right to engage in expression protected by the First Amendment and Ark. Const., Art. 2, § 6, by punishing speech about lawful activity. The State could have achieved its goal of protecting minors in a more narrowly tailored way by prohibiting sex between an 18-year-old and a 14-year-old, especially given that a prior version of the statute criminalized only solicitations of sexual conduct that otherwise would have been illegal. *Worsham v. State*, 2019 Ark. App. 65, 572 S.W.3d 1 (2019).

Construction.

Trial court properly directed a verdict in defendant’s favor in the State’s action for engaging in sexual indecency with a child under subdivision (a)(4)(C) (now (a)(4)(D)) of this section, because exposure must be to “another person” other than the defendant. A plain reading of this section indicates that the section clearly differenti-

ated among the person (actor), the victim, and “another person” and that same distinction must be carried forward throughout the section. *State v. Coble*, 2016 Ark. 114, 487 S.W.3d 370 (2016) (decided before 2016 amendment).

Evidence.

Sufficient evidence supported defendant’s sexual-indecency conviction because ample evidence allowed a jury to infer defendant exposed himself to children to gratify defendant’s sexual desire. *Ward v. State*, 2014 Ark. App. 408, 439 S.W.3d 56 (2014).

Evidence was sufficient to convict defendant of sexual indecency with a child because while a photograph was simply the manner he selected for the minor victim to view his exposed penis, he intentionally laid his penis open to view by a member of his church congregation for the purpose of arousing or gratifying his sexual desire, and what she saw when she viewed the photograph was no different than what she would have seen had defendant pulled down his pants while standing in front of her. *Malvin v. State*, 2014 Ark. App. 584, 446 S.W.3d 208 (2014).

Because defendant’s arguments on appeal were not part of his directed-verdict motion in the circuit court, his arguments were not preserved for appellate review; however, even had defendant preserved his arguments, his motion for a directed verdict on the sexual indecency with a child charge was properly denied. The victim’s testimony that defendant said he was going to perform fellatio on the victim for some money was sufficient evidence to support defendant’s conviction, and any forensic evidence on the condom wrapper found at the scene was irrelevant to the offense of sexual indecency because sexual

indecenty only required solicitation of sexual intercourse or contact. *Langford v. State*, 2015 Ark. App. 289, 461 S.W.3d 712 (2015).

In a motion for a directed verdict at the close of the State's case, in which no specific element of the offense of sexual indecenty with a child was challenged, and, at the close of all the evidence, in which defendant renewed his motion for directed verdict but added that the State had failed to prove solicitation where the explicit story sent to the victim, defendant's younger stepdaughter, did not request or ask the victim to do anything sexual, defendant's failure to make a specific motion for directed verdict at the close of the State's case rendered the lack of sufficient proof of the solicitation issue not preserved for appellate review. *Campbell v. State*, 2017 Ark. App. 59, 512 S.W.3d 663 (2017).

In a case where defendant was convicted of one count of sexual indecenty with a child, the trial court did not abuse its discretion in permitting the State to ask the victim, defendant's younger stepdaughter, about the contents of emails or messages she received in relation to the explicit stories sent to her by defendant because there was no evidence, nor had it been alleged, that the police or the State lost or destroyed the electronic communications or that any loss or destruction was in bad faith, and as such, other evidence of the contents was admissible under Ark. R. Evid. 1004. *Campbell v. State*, 2017 Ark. App. 59, 512 S.W.3d 663 (2017).

In a case where defendant was convicted of one count of sexual indecenty with a child, the trial court did not err in permitting the victim, defendant's younger stepdaughter, to testify to the

general content of messages and the stories that defendant sent to the victim about a sexual relationship between a stepfather and stepdaughter, as that was not to prove the truth of the messages or the truth of the fictional stories, but, instead, it gave context to how the victim came to be in possession of the stories and provided the basis for her having suspicions that the sender was her stepfather. *Campbell v. State*, 2017 Ark. App. 59, 512 S.W.3d 663 (2017).

In a case where defendant was convicted of one count of sexual indecenty with a child, defendant admitted having sent one story to the victim, and thus that story constituted an admission of a party opponent, which was not hearsay under Ark. R. Evid. 801. *Campbell v. State*, 2017 Ark. App. 59, 512 S.W.3d 663 (2017).

Evidence was sufficient to convict defendant of three counts of sexual indecenty with a child, a Class D felony, because the plain language of subdivision (a)(2) of this section does not contain a requirement that the child consciously observed the indecent exposure; and, in any event, the trial court simply restated the language of the elements as written in the statute without defining whether the word "to" required proof that the child saw defendant's exposed genitals, and concluded that the State had made a prima facie case that presented a question of fact for the jury to decide. In addition, it was not improper to charge defendant with three offenses rather than two; while defendant only lifted his shirt twice, he laid his sex organs open to view to three children. *Krol v. State*, 2018 Ark. App. 512, 563 S.W.3d 586 (2018).

Cited: *Wilson v. State*, 2017 Ark. App. 385 (2017).

5-14-113. Sexual extortion.

(a) A person commits the offense of sexual extortion if:

(1) With the purpose to coerce another person to engage in sexual contact or sexually explicit conduct, the person communicates a threat to:

(A) Damage the property or harm the reputation of the other person; or

(B) Produce or distribute a recording of the other person engaged in sexually explicit conduct or depicted in a state of nudity;

(2) With the purpose to produce or distribute a recording of a person in a state of nudity or engaged in sexually explicit conduct, the person communicates a threat to:

(A) Damage the property or harm the reputation of the other person; or

(B) Produce or distribute a recording of the other person engaged in sexually explicit conduct or depicted in a state of nudity; or

(3) The person knowingly causes another person to engage in sexual contact or sexually explicit conduct or to produce or distribute a recording of a person in a state of nudity or engaged in sexually explicit conduct by communicating a threat to:

(A) Damage the property or harm the reputation of the other person; or

(B) Produce or distribute a recording of the other person engaged in sexually explicit conduct or depicted in a state of nudity.

(b) Sexual extortion is a Class B felony.

History. Acts 2017, No. 664, § 2.

5-14-124. Sexual assault in the first degree.

(a) A person commits sexual assault in the first degree if:

(1) The person engages in sexual intercourse or deviate sexual activity with a minor who is not the actor's spouse and the actor is:

(A) Employed with the Division of Correction, the Division of Community Correction, the Department of Human Services, or any city or county jail or a juvenile detention facility, and the victim is in the custody of the Division of Correction, the Division of Community Correction, the Department of Human Services, any city or county jail or juvenile detention facility, or their contractors or agents;

(B) Employed by or contracted with the Division of Community Correction, a local law enforcement agency, a court, or a local government and the actor is supervising the minor while the minor is on probation or parole or for any other court-ordered reason;

(C) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(D) An employee in the victim's school or school district, a temporary caretaker, or a person in a position of trust or authority over the victim; or

(2) The person is a teacher, principal, athletic coach, or counselor in a public or private school in kindergarten through grade twelve (K-12) and the actor:

(A) Engages in sexual intercourse or deviate sexual activity with a person who is not the actor's spouse and the victim is:

(i) Less than twenty-one (21) years of age; and

(ii) A student enrolled in the public or private school employing the actor; and

- (B) Is in a position of trust or authority over the victim and uses his or her position of trust or authority over the victim to engage in sexual intercourse or deviate sexual activity.
- (b) It is no defense to a prosecution under this section that the victim consented to the conduct.
- (c) It is an affirmative defense to a prosecution under subdivision (a)(1)(D) of this section that the actor was not more than three (3) years older than the victim.
- (d) Sexual assault in the first degree is a Class A felony.

History. Acts 2001, No. 1738, § 2; 2003, No. 1391, § 1; 2003, No. 1469, § 2; 2009, No. 748, § 10; 2009, No. 758, § 2; 2013, No. 1044, § 1; 2017, No. 418, § 2; 2019, No. 910, § 670.

Amendments. The 2017 amendment inserted (a)(1)(B) and redesignated the remaining subdivisions accordingly.

The 2019 amendment substituted “Division of Correction” for “Department of Correction” and “Division of Community Correction” for “Department of Community Correction” throughout (a)(1)(A) and (a)(1)(B).

RESEARCH REFERENCES

ALR. Sufficiency of Allegations or Evidence of Serious Bodily Injury to Support Charge of Aggravated Degree of Rape, Sodomy, or Other Sexual Abuse. 103 A.L.R.6th 507 (2015).

CASE NOTES

ANALYSIS

Constitutionality.
Evidence.
Jury Instructions.

Constitutionality.
Conviction for first-degree sexual assault did not violate the constitutional right to privacy because such protection was not extended to an adult’s sexual relationship with a minor. Defendant and the victim began having sex when she was 15 years old; moreover, the State had an interest in protecting students from sexual advances from their teachers and school employees who had unique access to minors and were inherently viewed as authority figures. *Akers v. State*, 2015 Ark. App. 352, 464 S.W.3d 483 (2015).

Evidence.
Evidence was sufficient to support a conviction for first-degree sexual assault

because additional evidence that defendant utilized a position of trust and authority to engage in sex with a student was not required; this section was written in the disjunctive, so proof of any of the items listed was sufficient. *Akers v. State*, 2015 Ark. App. 352, 464 S.W.3d 483 (2015).

Jury Instructions.
In a first-degree sexual assault case, there was no error in failing to give a jury instruction that required the jury to find that defendant held a position of trust and authority over the victim and utilized that position of trust and authority to influence her to have sex with him since proof of additional elements was not required. *Akers v. State*, 2015 Ark. App. 352, 464 S.W.3d 483 (2015).

5-14-125. Sexual assault in the second degree.

- (a) A person commits sexual assault in the second degree if the person:

(1) Engages in sexual contact with another person by forcible compulsion;

(2) Engages in sexual contact with another person who is incapable of consent because he or she is:

- (A) Physically helpless;
- (B) Mentally defective; or
- (C) Mentally incapacitated;

(3) Being eighteen (18) years of age or older, engages in sexual contact with another person who is:

- (A) Less than fourteen (14) years of age; and
- (B) Not the person's spouse;

(4)(A) Engages in sexual contact with a minor and the actor is:

(i) Employed with the Division of Correction, the Division of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the actor;

(ii) Employed by or contracted with the Division of Community Correction, a local law enforcement agency, a court, or a local government and the actor is supervising the minor while the minor is on probation or parole or for any other court-ordered reason;

(iii) A mandated reporter under § 12-18-402(b) and is in a position of trust or authority over the minor; or

(iv) The minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor.

(B) For purposes of subdivision (a)(4)(A) of this section, consent of the minor is not a defense to a prosecution;

(5)(A) Being a minor, engages in sexual contact with another person who is:

- (i) Less than fourteen (14) years of age; and
- (ii) Not the person's spouse.

(B) It is an affirmative defense to a prosecution under this subdivision (a)(5) that the actor was not more than:

(i) Three (3) years older than the victim if the victim is less than twelve (12) years of age; or

(ii) Four (4) years older than the victim if the victim is twelve (12) years of age or older; or

(6) Is a teacher, principal, athletic coach, or counselor in a public or private school in a grade kindergarten through twelve (K-12), in a position of trust or authority, and uses his or her position of trust or authority over the victim to engage in sexual contact with a victim who is:

- (A) A student enrolled in the public or private school; and
- (B) Less than twenty-one (21) years of age.

(b)(1) Sexual assault in the second degree is a Class B felony.

(2) Sexual assault in the second degree is a Class D felony if committed by a minor with another person who is:

- (A) Less than fourteen (14) years of age; and

(B) Not the person's spouse.

History. Acts 2001, No. 1738, § 3; 2003, No. 1323, § 1; 2003, No. 1720, § 2; 2009, No. 748, §§ 11-13; 2009, No. 758, § 3; 2011, No. 1129, § 1; 2013, No. 1086, § 2; 2017, No. 418, § 3; 2019, No. 910, § 671.

Amendments. The 2017 amendment inserted “the” preceding “Department of Community Correction” in (a)(4)(A)(i); inserted (a)(4)(A)(ii); and redesignated the remaining subdivisions accordingly.

The 2019 amendment substituted “Division of Correction” for “Department of Correction” and “Division of Community Correction” for “Department of Community Correction” in (a)(4)(A)(i) and substituted “Division of Community Correction” for “Department of Community Correction” in (a)(4)(A)(ii).

RESEARCH REFERENCES

ALR. Sufficiency of Allegations or Evidence of Serious Bodily Injury to Support Charge of Aggravated Degree of Rape,

Sodomy, or Other Sexual Abuse. 103 A.L.R.6th 507 (2015).

CASE NOTES

ANALYSIS

Appellate Review.
Cross-Examination.
Evidence.
—Admissibility.
—Sufficiency.
Information.
Jury Instructions.
Lesser Included Offense.

Appellate Review.

Defendant did not preserve a sufficiency of the evidence challenge because defendant's trial court argument was based on whether an element of rape was proved, but defendant was convicted of the lesser-included offense of second-degree sexual assault; and defendant failed to move for a directed verdict on second-degree sexual assault either by name or by a specific element of the offense. *King v. State*, 2018 Ark. App. 309 (2018).

Juvenile's challenge to the sufficiency of the evidence supporting the finding that he committed second-degree sexual assault was not preserved because in making his motion for dismissal, he did not advise the trial court of the element of the offense that the State failed to prove; in any event, the State sufficiently proved forcible compulsion where the victim testified that the juvenile shoved her against the wall and put one hand on her shoulder and one hand down her pants while she

kept telling him to stop. *P.J. v. State*, 2019 Ark. App. 315, 578 S.W.3d 307 (2019).

Cross-Examination.

Because the circuit court erred by not conducting an in camera review of the alleged sexual assault victim's Department of Human Services file to determine if it contained information material to the defense concerning the victim's accusations against her biological father, which were later recanted, remand for further proceedings was necessary for the court to conduct an in camera review of the file. If the file contained information that probably would have changed the outcome of the trial, defendant was to receive a new trial unless the nondisclosure was harmless beyond a reasonable doubt. *Taffner v. State*, 2018 Ark. 99, 541 S.W.3d 430 (2018).

Evidence.

In a second-degree sexual assault and attempted rape case, a trial court did not abuse its discretion by excluding evidence from the victim's former classmates because the classmates' testimony about what the victim did in public would not have been similar to the testimony that the victim gave detailing what defendant did to her. The allegations against defendant did not occur in public places; moreover, the evidence that the victim was the aggressor was not relevant since the victim could not have consented. *Bean v.*

State, 2014 Ark. App. 107, 432 S.W.3d 87 (2014).

Evidence was sufficient to convict defendant of second-degree sexual assault because a victim's testimony was substantial evidence to sustain the conviction; even if defendant was checking on the victim's welfare, this did not explain why he touched her breast or put his hands in her pants when she fell asleep in his truck. *Harris v. State*, 2014 Ark. App. 264 (2014).

Evidence was sufficient to convict defendant of rape and sexual assault where both victims testified that defendant penetrated their vaginas with his penis; the credibility of the witnesses was for the jury to decide. Moreover, an officer's testimony established that defendant was between 17 and 20 years old over the course of time that he sexually abused one of the victims, so the jury could have reasonably concluded that at least two of the sexual assaults occurred after defendant turned 18. *Thompson v. State*, 2015 Ark. App. 275, 461 S.W.3d 368 (2015).

Evidence was sufficient to convict defendant of second-degree sexual assault because the victim testified that defendant jumped on top of her, used his body to pin her down on a couch, used his leg to try to pry her legs open, and pulled down her shirt and sucked on her breast; she testified that he grabbed her hand and pulled it to his sexual organ, which he had exposed; she said that she told defendant no and tried to fight him off but that she could not move; defendant admitted in his statement to the police that he was trying to have sex with the victim, that they kissed, and that he grabbed her breasts; and, when approached by police officers at his place of employment on the day of the incident, defendant fled. *Europe v. State*, 2015 Ark. App. 460, 468 S.W.3d 792 (2015).

Evidence was sufficient to sustain defendant's second-degree sexual assault conviction, where the victim's testimony established forcible compulsion by defendant and that she was asleep and could not have consented when the act began, thereby establishing physical helplessness. *Robinson v. State*, 2016 Ark. App. 550, 506 S.W.3d 881 (2016).

Evidence showing that defendant crept into the bedroom at night, put his hand underneath the covers, touched the sleep-

ing victim's vagina, told her not to tell anyone when she awoke, and said, in his interview with police, that he had touched the victim's vagina, was sufficient to support defendant's conviction for second-degree sexual assault. *Chawangkul v. State*, 2016 Ark. App. 599, 509 S.W.3d 10 (2016).

Although defendant argued that it was unclear from the alleged victim's testimony as to where defendant had touched the victim, this argument lacked merit because the victim testified that the victim woke up in the middle of the night at defendant's home to defendant touching the victim in the victim's shorts and putting defendant's hand on the victim's "privates." Upon further questioning, the victim stated that defendant's hands were on the victim's "genitals." *Bynum v. State*, 2017 Ark. App. 41, 511 S.W.3d 860 (2017).

Although defendant argued that there was no testimony to show that defendant had been 18 years old or older at the time of the alleged offenses or that either of the alleged victims were not defendant's spouse, these arguments were without merit. The victims testified that they were friends with defendant's children, who were similar in age to their respective ages, and defendant's spouse testified that defendant had been married for over 20 years and that defendant was then 54 years of age. *Bynum v. State*, 2017 Ark. App. 41, 511 S.W.3d 860 (2017).

Evidence was sufficient to convict defendant of second-degree sexual assault as it could be assumed that defendant's sexual contact with the victim was for sexual gratification because he entered the victim's home and touched her breast and vagina while she was in the bathtub. *Holland v. State*, 2017 Ark. App. 49, 510 S.W.3d 311 (2017).

Substantial evidence supported a second-degree sexual assault conviction where defendant's statements on the video and testimony about his excitement when replaying the video while bragging about it led to the reasonable conclusion that his actions were taken in an effort to achieve sexual gratification. *Sorum v. State*, 2017 Ark. App. 384, 526 S.W.3d 50 (2017).

—Admissibility.

Trial court did not err in admitting evidence under Ark. R. Evid. 404(b) that defendant had made sexual remarks to

the victim where the remarks showed his sexual attraction to the victim, thereby illustrating his state of mind. *Robinson v. State*, 2016 Ark. App. 550, 506 S.W.3d 881 (2016).

Circuit court did not err in admitting a counselor's testimony about the six-year-old child's outburst at school that defendant had touched her inappropriately and the counselor's subsequent conversation with the child that prompted a call to the child-abuse hotline, as the testimony was offered as a basis for the counselor's actions; the circuit court gave a limiting instruction that the testimony not be taken for the truth of the matter asserted, and understanding the basis for the counselor's actions was important given defendant's claim of fabrication. *Mondy v. State*, 2019 Ark. App. 290, 577 S.W.3d 460 (2019).

While defendant's prior crime was temporally removed from the current charges by more than 17 years, the prior crime and current charges were very similar in character, as defendant was accused of sexually abusing girls who were approximately six years old by committing very similar sexual acts, and both times, he had a close family or domestic relationship with the girls and committed the acts at home; the circuit court did not abuse its discretion in finding the prior conviction admissible under Ark. R. Evid. 404(b). *Mondy v. State*, 2019 Ark. App. 290, 577 S.W.3d 460 (2019).

Propriety of the State's calling a witness for impeachment purposes after the witness told the prosecutor she did not remember the events, if error, was harmless as prejudice was not shown; defendant opened the door to questions about his prior conviction and testified at length about the issue, the State's questions to the witness were significantly less prejudicial than defendant's own testimony about the prior events, and the child victim testified at length about defendant's abuse, such that the evidence of his guilt was overwhelming. *Mondy v. State*, 2019 Ark. App. 290, 577 S.W.3d 460 (2019).

—Sufficiency.

Testimony by the minor victims, defendant's cousins, and defendant's admission during a police interrogation to the sexual assault and rape of one victim, constituted sufficient evidence to support defendant's

convictions for rape and second-degree sexual assault. The victims both described the sexual acts using their own body-parts terminology, such as "middle spot" and "private part," and explained to which body parts they were referring in terms of "penis" and "anus." *Garcia v. State*, 2017 Ark. App. 457, 530 S.W.3d 862 (2017).

Evidence was sufficient to convict defendant, age 28, of two counts of rape and two counts of second-degree sexual assault committed against the 13-year-old victim because the victim testified that she was 13 years old, and she described in detail two episodes where defendant engaged in both sexual intercourse and sexual contact with her; the State was not required to prove forcible compulsion; and mistake of age was not a defense. *Trotter v. State*, 2018 Ark. App. 326, 551 S.W.3d 421 (2018).

Trial court did not err by denying defendant's directed-verdict motions because the victim's testimony, without more, was sufficient to sustain a conviction for second-degree sexual assault; the victim testified to several different ways the sexual contact had occurred, but they all involved sexual contact, and any discrepancies were to be resolved by the finder of fact. *Wilson v. State*, 2018 Ark. App. 371, 554 S.W.3d 279 (2018).

Circuit court properly denied defendant's motion for a directed verdict on the sexual assault charges where the child victim testified that defendant had inappropriately touched her while she was under his care, the court found her credible, an investigator's testimony explained why the victim's interview and testimony about the assault may not have aligned in every respect, and the court found the mother's former boyfriend credible in testifying about prior assaults. *Gilton v. State*, 2018 Ark. App. 486, 562 S.W.3d 257 (2018).

Defendant's motion for directed verdict was properly denied as the evidence was sufficient to convict defendant of, *inter alia*, five counts of second-degree sexual assault under subdivision (a)(4)(A)(iv) of this section because the child victim testified that defendant touched her breasts and between her legs, with his hands and his mouth, on multiple occasions over the course of six years; further, the circuit court did not abuse its discretion in allowing leading questions. *Wingfield v. State*,

2019 Ark. App. 111, 572 S.W.3d 434 (2019).

Evidence was sufficient to support defendant's conviction for sexual assault in the second degree because testimony revealed that the victim was in kindergarten at the time of the occurrences and the victim testified that defendant touched the victim through the victim's clothes on multiple occasions—sometimes in the presence of others—by placing the victim on defendant's lap and using a magazine to shield defendant's hand touching the victim's penis through the victim's clothes. Furthermore, an adult relative testified as to having seen the victim sitting on defendant's lap. *Ralston v. State*, 2019 Ark. App. 175, 573 S.W.3d 607 (2019).

Information.

In a rape case, the State should not have been allowed to add the charge of second-degree sexual assault to an information at trial; defendant was unfairly surprised because he did not learn that the State intended to amend the information until after he made a motion to dismiss for failure to prove penetration. Defendant was prepared to defend against the essential element of penetration, and the amendment came after the State's witnesses were able to testify about acts that did not go to the elements of the rape charge. *Martinez v. State*, 2014 Ark. App. 182, 432 S.W.3d 689 (2014).

Jury Instructions.

Because (1) the term "temporary caretaker" in this section is not defined by statute, (2) the model criminal instruction did not include a definition of the term, and (3) the definition in the non-model instruction was a correct statement of law regarding the definition of the term, the circuit court did not err in giving the non-model instruction defining "temporary caretaker". *Rowland v. State*, 2017 Ark. App. 415, 528 S.W.3d 283 (2017).

Circuit court did not err in denying defendant's request for an alternative sen-

tencing instruction; the circuit court considered that defendant had now been convicted of three counts of sexual assault against very young children, and prejudice could not be shown, as the jury imposed a sentence more severe than the minimum sentencing option, indicating the jury would not have imposed an alternative sentence if provided that option. *Mondy v. State*, 2019 Ark. App. 290, 577 S.W.3d 460 (2019).

Lesser Included Offense.

Juvenile was properly adjudicated delinquent for committing second-degree assault and his due-process rights were not violated because the juvenile confirmed that he engaged in deviate sexual activity by penetrating the victim's anus without touching her, forcible compulsion was an element of both rape and second-degree sexual assault, and the juvenile could not claim surprise by the trial court's true finding as to the lesser-included offense where he was on notice of the greater offense. *X.O.P. v. State*, 2014 Ark. App. 424, 439 S.W.3d 711 (2014).

Circuit court did not abuse its discretion when it declined defendant's request to include a lesser-included-offense jury instruction for second-degree sexual assault; second-degree sexual assault is not a lesser-included offense of rape because it requires proof of two elements that rape does not: defendant's age (18 or over) and defendant's marital status (not married to the victim). *Hartman v. State*, 2015 Ark. 30, 454 S.W.3d 721 (2015).

Circuit court's mistake in failing to give a lesser-included instruction on second-degree sexual assault in a rape case did not constitute reversible error because there was no rational basis for instructing the jury on the lesser-included offense where a victim testified that defendant inserted his penis into her vagina against her will, and the DNA evidence established that defendant was the perpetrator. *Burris v. State*, 2015 Ark. App. 126 (2015).

5-14-126. Sexual assault in the third degree.

(a) A person commits sexual assault in the third degree if the person:

(1) Engages in sexual intercourse or deviate sexual activity with another person who is not the actor's spouse, and the actor is:

(A) Employed with the Division of Correction, Division of Community Correction, Department of Human Services, or any city or county jail, the victim is in the custody of the Division of Correction, Division of Community Correction, Department of Human Services, or any city or county jail, and the actor is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity;

(B) Employed by or contracted with the Division of Community Correction, a local law enforcement agency, a court, or a local government and the actor is supervising the person while the person is on probation or parole or for any other court-ordered reason;

(C) Employed or contracted with or otherwise providing services, supplies, or supervision to an agency maintaining custody of inmates, detainees, or juveniles, the victim is in the custody of the Division of Correction, Division of Community Correction, Department of Human Services, or any city or county jail, and the actor is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(D) A mandated reporter under § 12-18-402(b) or a member of the clergy and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity; or

(2)(A) Being a minor, engages in sexual intercourse or deviate sexual activity with another person who is:

- (i) Less than fourteen (14) years of age; and
- (ii) Not the person's spouse.

(B) It is an affirmative defense under this subdivision (a)(2) that the actor was not more than three (3) years older than the victim.

(b) It is no defense to a prosecution under this section that the victim consented to the conduct.

(c) Sexual assault in the third degree is a Class C felony.

History. Acts 2001, No. 1738, § 4; 2003, No. 1324, § 1; 2007, No. 363, § 1; 2009, No. 748, § 14; 2009, No. 758, § 4; 2017, No. 418, § 4; 2017, No. 660, § 1; 2019, No. 910, § 672.

Amendments. The 2017 amendment by No. 418 inserted present (a)(1)(B); re-designated the remaining subdivisions accordingly; and made stylistic changes.

The 2017 amendment by No. 660, in (a)(1)(A) and (a)(1)(B) [now (a)(1)(C)], deleted "and" preceding the first occurrence

of "victim" and added "and the actor is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity".

The 2019 amendment substituted "Division of Correction" for "Department of Correction" and "Division of Community Correction" for "Department of Community Correction" in (a)(1)(A) through (a)(1)(C).

RESEARCH REFERENCES

ALR. Sufficiency of Allegations or Evidence of Serious Bodily Injury to Support

Charge of Aggravated Degree of Rape, Sodomy, or Other Sexual Abuse. 103

A.L.R.6th 507 (2015).

5-14-127. Sexual assault in the fourth degree.

(a) A person commits sexual assault in the fourth degree if the person:

(1) Being twenty (20) years of age or older:

(A) Engages in sexual intercourse or deviate sexual activity with another person who is:

(i) Less than sixteen (16) years of age; and

(ii) Not the person's spouse; or

(B) Engages in sexual contact with another person who is:

(i) Less than sixteen (16) years of age; and

(ii) Not the person's spouse; or

(2) Engages in sexual contact with another person who is not the actor's spouse, and the actor is employed with the Division of Correction, Division of Community Correction, Department of Human Services, or any city or county jail, and the victim is in the custody of the Division of Correction, Division of Community Correction, Department of Human Services, or a city or county jail.

(b)(1) Sexual assault in the fourth degree under subdivisions (a)(1)(A) and (a)(2) of this section is a Class D felony.

(2) Sexual assault in the fourth degree under subdivision (a)(1)(B) of this section is a Class A misdemeanor if the person engages only in sexual contact with another person as described in subdivision (a)(1)(B) of this section.

History. Acts 2001, No. 1738, § 5; 2003, No. 1325, § 1; 2009, No. 630, § 1; 2019, No. 910, § 673.

Amendments. The 2019 amendment substituted "Division of Correction" for

"Department of Correction" and "Division of Community Correction" for "Department of Community Correction" throughout (a)(2).

RESEARCH REFERENCES

ALR. Sufficiency of Allegations or Evidence of Serious Bodily Injury to Support Charge of Aggravated Degree of Rape,

Sodomy, or Other Sexual Abuse. 103 A.L.R.6th 507 (2015).

CASE NOTES

Evidence.

Defendant's appeal of the revocation of his probation was wholly without merit because he still owed restitution, the victim's testimony established the elements for fourth-degree sexual assault, the trial court rulings provided no possible grounds for reversal, and counsel fully complied with the Supreme Court's Rules for withdrawal. *Stockton v. State*, 2014 Ark. App. 300 (2014).

In a fourth-degree sexual assault case, defendant abandoned the issue of the sufficiency of the victim's testimony because he did not raise the issue in the circuit court; however, even if the argument had been preserved for review, the appellate court would have affirmed defendant's conviction because defendant was 20 years of age or older, the victim was 14 years old, and the two were not married; the victim testified that defendant pushed

her against the pantry door, touched her buttocks, and kissed her on the mouth; the victim's testimony could constitute substantial evidence to sustain a conviction for sexual assault; and defendant's assertion on appeal that the victim was lying was not a ground for reversal. *Echols v. State*, 2017 Ark. App. 352 (2017).

5-14-128. Registered offender living near school, public park, youth center, daycare, or church or other place of worship prohibited.

(a) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a:

(1) Level 3 or Level 4 offender may not knowingly reside within two thousand feet (2,000') of the property on which a public or private elementary or secondary school, public park, youth center, or daycare facility is located; or

(2) Level 4 offender may not knowingly reside within two thousand feet (2,000') of a church or other place of worship.

(b)(1) It is not a violation of this section if the property on which the sex offender resides is owned and occupied by the sex offender and was purchased prior to the date on which the public or private elementary or secondary school, public park, youth center, daycare facility, or church or other place of worship was established.

(2) The exclusion in subdivision (b)(1) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the public or private elementary or secondary school, public park, youth center, daycare facility, or church or other place of worship is established.

(c)(1)(A) With respect to a public or private elementary or secondary school or a daycare facility, it is not a violation of this section if the sex offender resides on property he or she owns prior to July 16, 2003.

(B) With respect to a public park or youth center, it is not a violation of this section if the sex offender resides on property he or she owns prior to July 31, 2007.

(2)(A) The exclusion in subdivision (c)(1)(A) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

(B) The exclusion in subdivision (c)(1)(B) of this section does not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense on or after July 31, 2007.

(3) With respect to a church or other place of worship, it is not a violation of this section if the sex offender resides on property he or she owns prior to July 22, 2015.

(d) A violation of this section is a Class D felony.

(e)(1) A person who is charged with violating this section shall be ordered as a condition of his or her release from custody not to return to the location where he or she was residing that was located within two thousand feet (2,000') of a public or private elementary or secondary school, public park, youth center, daycare facility, or church or other place of worship until the charge is adjudicated.

(2) The court having jurisdiction over the charge may order that the defendant be allowed to return to his or her residence before the adjudication of the charge if good cause is shown.

(f) As used in this section:

(1) “Church or other place of worship” means a physical location that has a primary purpose of facilitating the meeting of persons in order to practice a religion;

(2) “Public park” means any property owned or maintained by this state or a county, city, or town in this state for the recreational use of the public; and

(3) “Youth center” means any building, structure, or facility owned or operated by a not-for-profit organization or by this state or a county, city, or town in this state for use by minors to promote the health, safety, or general welfare of the minors.

History. Acts 2003, No. 330, § 3; 2007, No. 818, § 1; 2009, No. 1406, § 1; 2015, No. 376, § 1.

Amendments. The 2015 amendment added “or church or other place of worship” throughout; rewrote (a); added (c)(3); substituted “A violation of this sec-

tion is” for “A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates a provision of this section is guilty of” in (d); and inserted (f)(1) and redesignated the remaining subdivisions accordingly.

5-14-132. Registered offender prohibited from entering upon school campus — Exception.

(a) As used in this section:

(1) “Campus” means the real property, a building, or any other improvement in this state owned, leased, rented, or controlled by or for the operation of a public school;

(2) “Private school” means a school offering instruction for a grade in kindergarten through grade twelve (K-12) in this state that is not a public school; and

(3) “Public school” means any school in this state that is:

(A) A public school operated by a public school district;

(B) A charter school established under the Public School Funding Act of 2003, § 6-20-2301 et seq.;

(C) A state-funded prekindergarten program operated by a public school or an education service cooperative;

(D) The Arkansas School for the Blind;

(E) The Arkansas School for the Deaf;

(F) The Arkansas School for Mathematics, Sciences, and the Arts;

(G) An educational facility of the Division of Youth Services or contracting with the Division of Youth Services; or

(H) An educational facility of the Division of Developmental Disabilities Services.

(b) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly enter upon the campus of a public school.

(c) It is not a violation of this section if the sex offender:

(1) Is under twenty-two (22) years of age and is a student enrolled in a kindergarten through grade twelve (K-12) program;

(2) Enters upon the campus for the purpose of attending a graduation ceremony or a baccalaureate ceremony;

(3) Enters upon the campus on a day that is not designated a student contact day by the public school's calendar or on a day in which no school-sponsored event is taking place upon the campus;

(4) Is the parent or guardian of a student enrolled in a public school and enters upon the campus where the student is enrolled for the purpose of:

(A) Delivering to the student medicine, food, or personal items if the medicine, food, or personal items are delivered directly to the public school's office; or

(B) Attending a scheduled parent-teacher conference if the sex offender is escorted to and from the scheduled parent-teacher conference by a designated public school official or employee;

(5) Has been assessed as a Level 3 offender and enters upon the campus for the purpose of attending a school-sponsored event for which an admission fee is charged or tickets are sold or distributed if the sex offender:

(A)(i) Is the parent or guardian of, is related by blood or marriage within the second degree of consanguinity to, or is a great-grandparent of a student enrolled in the public school.

(ii) The degree of consanguinity is computed under § 28-9-212; and

(B) Notifies the administration of the school in writing at least twenty-four (24) hours before the start of the school-sponsored event for which an admission fee is charged or tickets are sold or distributed that he or she will be attending the school-sponsored event for which an admission fee is charged or tickets are sold or distributed; or

(6) Has been committed to the Division of Youth Services and attends a school operated by the Division of Youth Services.

(d)(1) A sex offender who is the parent or guardian of a student enrolled in a public school and wishes to enter upon the campus where the student is enrolled for any other purpose shall give reasonable notice to the public school principal or his or her designee.

(2)(A) The public school principal or his or her designee may allow the parent or guardian sex offender to enter upon the campus so long as there is a designated public school official or employee available to escort and supervise the parent or guardian sex offender while he or she remains on campus.

(B) If a designated public school official or employee is not available at the time the parent or guardian sex offender wishes to enter upon the campus, the parent or guardian sex offender shall not enter upon the campus until he or she is notified that a designated public school official or employee is available.

(e) Upon conviction, any sex offender who violates this section is guilty of a Class D felony.

(f) It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly enter upon the campus of a private school without:

(1) Notifying the private school; and

(2) Subsequently complying with any terms or conditions the private school requires before the sex offender is permitted to enter onto the campus.

History. Acts 2007, No. 992, § 1; 2009, No. 748, § 15; 2017, No. 267, § 1; 2017, No. 909, §§ 1, 2; 2019, No. 187, § 1.

Publisher's Notes. Acts 2017, No. 909, §§ 1, 2 specifically amended this section as amended by Acts 2017, No. 267.

Amendments. The 2017 amendment by No. 267 deleted "a school-sponsored event for which an admission fee is charged or tickets are sold distributed" preceding "a graduation" in (c)(2); and added (c)(5).

The 2017 amendment by No. 909 added the definition for "Private school" in (a); and added (f).

The 2019 amendment substituted "under" for "less than" and "kindergarten through grade" for "grade kindergarten through" in (c)(1); in (c)(5)(A)(i), substituted "second degree" for "fourth degree", and inserted "or is a great-grandparent of"; and added (c)(6).

5-14-135. Registered offender prohibited from participating in certain Halloween-related activities.

(a) As used in this section:

(1) "Costume" means an outfit worn to create the appearance or characteristic of a particular period, person, place, or thing; and

(2) "Halloween-related event" means an event involving children organized around and concerning the celebration of Halloween that occurs any time during the two (2) weeks before or after October 31 of each year, including without limitation:

(A) Trick-or-treating;

(B) A costume party; and

(C) An event involving the wearing of a costume or the handing out of candy to children.

(b) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly:

(1) Distribute candy or any item to a minor as part of a Halloween-related event; or

(2) Wear a mask or other costume as part of a Halloween-related event if a minor is present at the Halloween-related event.

(c) It is not an offense under:

(1) Subdivision (b)(1) of this section if the person is a parent or guardian of a minor to whom the candy or item is distributed; or

(2) Subdivision (b)(2) of this section if the person is a parent or guardian of all minors present at the Halloween-related event.

(d) A violation of this section is a Class D felony.

(e) It is a defense to prosecution under this section that the person was:

(1) Wearing a costume for a legitimate work-related event or purpose during normal business hours; or

(2) Engaged in the commercial or retail sale of candy or other Halloween-related merchandise.

History. Acts 2019, No. 463, § 1.

5-14-136. Unlawful female genital mutilation of a minor.

(a) As used in this section, “female genital mutilation” means a procedure that involves the partial or total removal of the external female genitalia or any procedure harmful to the female genitalia, including without limitation:

(1) A clitoridectomy;

(2) The partial or total removal of the clitoris or the prepuce;

(3) The excision or the partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora;

(4) The infibulation or the narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the labia minora or the labia majora, with or without excision of the clitoris;

(5) Pricking, piercing, incising, scraping, or cauterizing the genital area; or

(6) Any other action to purposely alter the structure or function of the female genitalia for a nonmedical reason.

(b) A person commits the offense of unlawful female genital mutilation of a minor if he or she:

(1) Knowingly performs female genital mutilation on a minor;

(2) Is a parent or guardian or has immediate custody or control of a minor and knowingly consents to, permits, or facilitates female genital mutilation of the minor; or

(3) Knowingly removes or causes, permits, or facilitates the removal of a minor from this state for the purpose of facilitating the female genital mutilation of the minor.

(c) Unlawful female genital mutilation of a minor is a Class C felony.

(d) It is not a defense under this section that:

(1) The unlawful conduct is required as a matter of religion, custom, ritual, or standard practice; or

(2) The minor’s parent or guardian consented to the female genital mutilation.

(e) It is not a violation of this section if the acts or conduct that otherwise would be considered female genital mutilation occurred in the furtherance of a surgical or other lawful medical procedure, performed by a licensed medical professional, and:

(1) Was necessary to preserve or protect the physical health of the minor upon whom the surgical or other lawful medical procedure was performed; or

(2) Was part of a sex reassignment procedure as requested by the minor who was the patient in the sex reassignment procedure.

(f) The statute of limitation for an offense under this section does not begin to run until the victim of the offense reaches eighteen (18) years of age or when the violation of this section is first reported to a law enforcement agency, whichever occurs first.

History. Acts 2019, No. 556, § 1.

5-14-137. Registered offender prohibited from recording person under 14 years of age — Unlawful use of recording online.

(a) As used in this section, “record” means to photograph, make, capture, generate, or save a print, negative, slide, motion picture, computer data file, videotape, or other mechanically, electronically, or chemically reproduced visual image or material.

(b) It is unlawful for a person who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to knowingly:

(1) Record a person under fourteen (14) years of age and post the recording of the person on an online social media platform or other internet website that allows the using or posting of a recording in any form after the person has previously been warned of his or her possible criminal exposure by a judge at the person’s sentencing for the offense for which the person is required to register as a sex offender, or by his or her parole or probation officer that recording a person under fourteen (14) years of age is a violation of his or her terms and conditions of his or her probation or parole; or

(2) Record a person under fourteen (14) years of age and post the recording of the person on an online social media platform or other internet website that allows the using or posting of a recording in any form in a manner that would suggest to a reasonable person that the person recording and posting the recording was doing so to unlawfully incite the prurient interest of himself, herself, or another person.

(c) A violation of this section is a Class D felony.

(d) It is a defense to prosecution under this section that:

(1) The person received permission from the parent or guardian of the person under fourteen (14) years of age to record the person under fourteen (14) years of age or to use or post a recording of the person under fourteen (14) years of age on an online social media platform or other internet website that allows the using or posting of a recording;

(2) The person who recorded or whose recording was used or posted on an online social media platform or other internet website that allows the using or posting of a recording was the parent or guardian of the person under fourteen (14) years of age;

(3) The person under fourteen (14) years of age who was recorded was not the subject of the recording or was in the background of the recording;

(4) A reasonable person would believe the appearance of the person under fourteen (14) years of age was ancillary to the main subject of the recording; or

(5) The recording of the person under fourteen (14) years of age was used or posted by a news organization.

History. Acts 2019, No. 621, § 2.

CHAPTER 16

VOYEURISM OFFENSES

SECTION.

5-16-101. Crime of video voyeurism.

5-16-102. Voyeurism.

5-16-101. Crime of video voyeurism.

(a) It is unlawful for a person to use a camera, videotape, photo-optical, photoelectric, or other image recording device for the purpose of secretly observing, viewing, photographing, filming, or videotaping another person who is present in a residence, place of business, school, or other structure, or a room or particular location within that structure, if the other person:

- (1) Is in a private area out of public view;
- (2) Has a reasonable expectation of privacy; and
- (3) Has not consented to the observation.

(b) It is unlawful for a person to knowingly use an unmanned vehicle or aircraft, a camcorder, a motion picture camera, a photographic camera of any type, or other equipment that is concealed, operated in a manner to escape detection, or disguised to secretly or surreptitiously videotape, film, photograph, record, or view by electronic means another person:

- (1) For the purpose of viewing any portion of the other person's body and for which the other person has a reasonable expectation of privacy;
- (2) Without the knowledge or consent of the other person; and
- (3) Under circumstances in which the other person has a reasonable expectation of privacy.

(c)(1)(A) A person who violates subsection (a) of this section for a first or second offense upon conviction is guilty of a Class D felony.

(B) A person who violates subsection (a) of this section for a third or subsequent offense upon conviction is guilty of a Class C felony.

(2)(A) A person who violates subsection (b) of this section upon conviction is guilty of a Class B misdemeanor.

(B) However, a person who violates subsection (b) of this section upon conviction is guilty of a Class A misdemeanor if the person:

(i) Distributed or transmitted the video recording, film, or photo to another person;

(ii) Posted the video recording, film, or photo in a format accessible by another person via the internet; or

(iii) Has previously been convicted of a violation of this section or § 5-16-102.

(d) This section does not apply to:

- (1) Video recording or monitoring conducted under a court order from a court of competent jurisdiction;
- (2) Security monitoring operated by or at the direction of an occupant of a residence;
- (3) Security monitoring operated by or at the direction of the owner or administrator of a place of business, school, or other structure;
- (4) Security monitoring operated in a motor vehicle used for public transit;
- (5) Security monitoring and observation associated with a correctional facility, regardless of the location of the monitoring equipment;
- (6) Video recording or monitoring conducted by a law enforcement officer within the official scope of his or her duty; or
- (7) Videotaping under § 12-18-615(b).

History. Acts 1999, No. 757, § 1; 2001, No. 532, § 1; 2007, No. 187, § 1; 2009, No. 330, § 1; 2009, No. 758, § 5; 2015, No. 293, § 1; 2019, No. 461, § 1.

Amendments. The 2015 amendment inserted “an unmanned vehicle or aircraft” and “flown in a manner to escape detection” in (b).

The 2019 amendment rewrote the introductory language of (a); in the introduc-

tory language of (b), inserted “for a person”, substituted “operated” for “flown”, and substituted “another person” for “a person” at the end; rewrote (b)(1) through (b)(3); rewrote (c); and substituted “This section does not apply to” for “The provisions of this section do not apply to any of the following” in the introductory language of (d).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Lindsey P. Gustafson, Arkansas Airspace Ownership and the Challenge of Drones, 39 U. Ark. Little Rock L. Rev. 245 (2017).

5-16-102. Voyeurism.

- (a) As used in this section:
 - (1) “Nude or partially nude” means a person who has less than a fully opaque covering over the genitals, pubic area, buttocks, or breast of a female;
 - (2) “Private place” means a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent; and
 - (3) “Public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility where a good, service, facility, privilege, advantage, or accommodation is offered, sold, or otherwise made available to the public.
- (b) A person commits the offense of voyeurism if for the purpose of sexual arousal or gratification, he or she knowingly:
 - (1) Without the consent of each person who is present in the private place, personally or through the use of an unmanned vehicle or aircraft, looks into a private place that is, or is part of, a public accommodation and in which a person may reasonably be expected to be nude or partially nude; or

(2) Enters personally or through the use of an unmanned vehicle or aircraft another person’s private property without the other person’s consent and looks into any person’s dwelling unit if:

(A) The person looks into the dwelling with the purpose to intrude upon or interfere with a person’s privacy;

(B) The person looks into a part of the dwelling in which a person is present;

(C) The person present has a reasonable expectation of privacy in that part of the dwelling; and

(D) The person present does not consent to the person’s looking into that part of the dwelling.

(c) A person who violates this section upon conviction is guilty of a:

(1) Class D felony if:

(A) A victim is under seventeen (17) years of age and the person who commits the offense holds a position of trust or authority over the victim; or

(B) The person has previously been convicted of an offense under this section or § 5-16-101; or

(2) Class A misdemeanor if otherwise committed.

History. Acts 2005, No. 1642, § 1; 2007, No. 187, § 2; 2015, No. 293, § 2; 2019, No. 461, § 2. Amendments. The 2015 amendment inserted “personally or through the use of an unmanned vehicle or aircraft” in (b)(1) and (2); and substituted “purpose” for “intent” in (b)(2)(A).	The 2019 amendment deleted “all of the following apply” following “if” at the end of the introductory language of (b)(2); substituted “a person” for “an individual” in (b)(2)(B); substituted “person” for “individual” in (b)(2)(C) and (D); rewrote (c); and made a stylistic change.
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RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Lindsey P. Gustafson, Arkansas Airspace Ownership	and the Challenge of Drones, 39 U. Ark. Little Rock L. Rev. 245 (2017).
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CHAPTER 18

HUMAN TRAFFICKING ACT OF 2013

SECTION.

5-18-103. Trafficking of persons.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Mary Ward, Note: Arkansas’s Human Trafficking Laws: Steps in the Right Di-	rection or a False Sense of Accomplishment?, 37 U. Ark. Little Rock L. Rev. 133 (2014).
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5-18-101. Title.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Proscribing Human Trafficking. 101 A.L.R.6th 417 (2015).

5-18-102. Definitions.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Proscribing Human Trafficking. 101 A.L.R.6th 417 (2015).

CASE NOTES

Commercial Sexual Activity.
Substantial evidence supported the jury’s verdict that defendant was guilty of human trafficking of a minor for commercial sexual activity under § 5-18-103(a)(4) where the victim and her friend testified that defendant knowingly provided the victim to a man in exchange for methamphetamine, and that testimony was not so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not have differed about it. Lee v. State, 2019 Ark. App. 184, 574 S.W.3d 211 (2019).

5-18-103. Trafficking of persons.

- (a) A person commits the offense of trafficking of persons if he or she knowingly:
(1) Recruits, harbors, transports, obtains, entices, solicits, isolates, provides, or maintains a person knowing that the person will be subjected to involuntary servitude;
(2) Benefits financially or benefits by receiving anything of value from participation in a venture under subdivision (a)(1) of this section;
(3) Subjects a person to involuntary servitude;
(4) Recruits, entices, solicits, isolates, harbors, transports, provides, maintains, or obtains a minor for commercial sexual activity;
(5) Sells or offers to sell travel services that he or she knows include an activity prohibited under subdivisions (a)(1)-(4) of this section;
(6) Recruits, entices, solicits, isolates, harbors, transports, provides, maintains, or obtains a pregnant woman for the purpose of causing the pregnant woman by the use of or threatened use of physical force to place the baby who is not yet born for adoption; or
(7) Benefits financially or benefits by receiving anything of value from participating in an act described under subdivision (a)(6) of this section.
- (b) It is not a defense to prosecution under subdivision (a)(4) of this section that the actor:
(1) Did not have knowledge of a victim’s age; or
(2) Mistakenly believed a victim was not a minor.
- (c)(1) Trafficking of persons is a Class A felony.
(2) Trafficking of persons is a Class Y felony if a victim was a minor at the time of the offense.

(d) In addition to any other sentence authorized by this section, a person who violates this section by offering to pay, agreeing to pay, or paying a fee to engage in sexual activity upon conviction shall be ordered to pay a fine of two hundred fifty dollars (\$250) to be deposited into the Safe Harbor Fund for Sexually Exploited Children.

History. Acts 2013, No. 132, § 3; 2013, No. 133, § 3; 2013, No. 1257, § 4; 2015, No. 1080, § 1; 2019, No. 1022, § 1.

Amendments. The 2015 amendment added (a)(5).

The 2019 amendment substituted “include” for “includes” in (a)(5); and added (a)(6) and (a)(7).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Proscribing Human Trafficking. 101 A.L.R.6th 417 (2015).

CASE NOTES

Evidence Sufficient.

Substantial evidence supported the jury’s verdict that defendant was guilty of human trafficking of a minor for commercial sexual activity under subdivision (a)(4) of this section where the victim and her friend testified that defendant knowingly provided the victim to a man in exchange for methamphetamine, and that testimony was not so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not have differed about it. *Lee v. State*, 2019 Ark. App. 184, 574 S.W.3d 211 (2019).

5-18-104. Patronizing a victim of human trafficking.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Proscribing Human Trafficking. 101 A.L.R.6th 417 (2015).

5-18-105. Enhanced liability of an organization.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Proscribing Human Trafficking. 101 A.L.R.6th 417 (2015).

SUBTITLE 3. OFFENSES INVOLVING FAMILIES, DEPENDENTS, ETC.

CHAPTER 26

OFFENSES INVOLVING THE FAMILY

- SUBCHAPTER.
- 2. OFFENSES GENERALLY.
 - 3. DOMESTIC BATTERING AND ASSAULT.

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

5-26-204. Unlawful solicitation for the re-

linquishment of parental rights.

5-26-203. Concealing birth.

CASE NOTES

ANALYSIS

Constitutionality.
Evidence.

Constitutionality.

Defendant’s argument that finding this section, the concealing-birth statute, to be constitutional was an impermissible judicial expansion of the law and made the statute too vague to give any pregnant woman and newly delivered mother clear notice of what constituted concealment of birth was rejected; the jury was tasked to decide why defendant had placed the still-born fetus in her vehicle, the jury determined it was to conceal the fact of the birth, the statute did not provide for any exceptions, including a grace period for concealment, nor did the statute require that the concealment be permanent, and a jury could have determined that the offense was committed when defendant hid the fetus in her vehicle. *Bynum v. State*, 2018 Ark. App. 201, 546 S.W.3d 533 (2018).

Evidence.

Evidence was sufficient to convict under this section where defendant wrapped a stillborn child in plastic sacks, placed the child in the front seat of her car, and locked the car in an attempt to hide the child from her mother. *Bynum v. State*, 2018 Ark. App. 201, 546 S.W.3d 533 (2018).

In defendant’s trial for concealing birth under this section, the circuit court abused its discretion in allowing discussion of abortion, defendant’s abortion history, and evidence that she had ingested medication prior to giving birth where it was undisputed that the child was not born alive, the evidence was irrelevant as to whether she had concealed the birth, and even if relevant, the probative value was substantially outweighed by the danger of unfair prejudice given the four-minute verdict. *Bynum v. State*, 2018 Ark. App. 201, 546 S.W.3d 533 (2018).

5-26-204. Unlawful solicitation for the relinquishment of parental rights.

(a)(1) A person commits the offense of unlawful solicitation for the relinquishment of parental rights in the first degree if in exchange for consenting to the person’s or another person’s placing a baby who is not yet born for adoption the person offers anything of value prohibited or not permitted under § 9-9-206 to the:

- (A) Biological mother of the baby who is not yet born;
- (B) Biological or putative father of the baby who is not yet born;
- (C) Spouse, partner, or other relative of the biological mother of the baby who is not yet born; or
- (D) Spouse, partner, or other relative of the biological or putative father of the baby who is not yet born.

(2) Unlawful solicitation for the relinquishment of parental rights in the first degree is a:

- (A) Class A felony if the person uses duress, coercion, undue influence, intimidation, a threat, fraud, or physical force to influence

an individual listed in subdivisions (a)(1)(A)-(D) of this section to allow the person or another person to place the baby who is not yet born for adoption; or

(B) Class C felony if otherwise committed.

(b)(1) A person commits the offense of unlawful solicitation for the relinquishment of parental rights in the second degree if in exchange for consenting to the person's adopting a baby who is not yet born the person offers anything of value prohibited or not permitted under § 9-9-206 to the:

(A) Biological mother of the baby who is not yet born;

(B) Biological or putative father of the baby who is not yet born;

(C) Spouse, partner, or other relative of the biological mother of the baby who is not yet born; or

(D) Spouse, partner, or other relative of the biological or putative father of the baby who is not yet born.

(2) Unlawful solicitation for the relinquishment of parental rights in the second degree is a:

(A) Class D felony if the person uses duress, coercion, undue influence, intimidation, a threat, fraud, or physical force to influence an individual listed in subdivisions (b)(1)(A)-(D) of this section to consent to the person's or another person's adopting the baby who is not yet born; or

(B) Class A misdemeanor if otherwise committed.

History. Acts 2019, No. 1022, § 2.

SUBCHAPTER 3 — DOMESTIC BATTERING AND ASSAULT

SECTION.

5-26-302. Definitions.

5-26-303. Domestic battering in the first degree.

5-26-305. Domestic battering in the third degree.

SECTION.

5-26-306. Aggravated assault on a family or household member.

5-26-314. Unlawful distribution of sexual images or recordings.

5-26-302. Definitions.

As used in this subchapter:

(1)(A) "Dating relationship" means a romantic or intimate social relationship between two (2) individuals that is determined by examining the following factors:

(i) The length of the relationship;

(ii) The type of the relationship; and

(iii) The frequency of interaction between the two (2) individuals involved in the relationship.

(B) "Dating relationship" does not include a casual relationship or ordinary fraternization between two (2) individuals in a business or social context;

(2) "Family or household member" means:

(A) A spouse;

- (B) A former spouse;
- (C) A parent;
- (D) A child, including any minor residing in the household;
- (E)(i) Persons related by blood within the fourth degree of consanguinity.

(ii) The degree of consanguinity is computed pursuant to § 28-9-212;

(F) Persons who presently or in the past have resided or cohabited together;

(G) Persons who have or have had a child in common; or

(H) Persons who are presently or in the past have been in a dating relationship together;

(3) “Harass” means an act of harassment as prohibited by § 5-71-208;

(4) “Intimidate” means to force into or deter from an action by inducing fear;

(5) “Sexual nature” means that an image, picture, video, or voice or audio recording depicts actual or simulated:

(A) Sexual intercourse;

(B) Deviate sexual activity;

(C) Bestiality;

(D) Masturbation;

(E) Sadomasochistic abuse for the purpose of sexual stimulation;

or

(F) Lewd exhibition of the:

(i) Genitals or pubic area of any person; or

(ii) Breast of a female; and

(6) “State of nudity” means:

(A) The appearance of a human anus, human genitals, or a female breast below a point immediately above the top of the areola; or

(B) A state of dress that fails to opaquely cover a human anus, human genitals, or a female breast below a point immediately above the top of the areola.

History. Acts 1995, No. 1291, § 8; 1999, No. 1317, § 1; 2001, No. 1678, § 2; 2005, No. 1875, § 2; 2015, No. 304, § 1.

Amendments. The 2015 amendment added (3) through (6).

CASE NOTES

Family or Household Member.

In a first-degree domestic battering case, the circuit court did not err in denying defendant’s motions for directed verdict because the evidence at trial showed that defendant was 22 years old when he shot the victim, who had been married to defendant’s mother when he was about seven or eight; defendant was between 13

and 15 years old when he stopped living with the victim based on the divorce between the victim and defendant’s mother; the victim continued to treat defendant like a son; defendant and the victim were persons who in the past had resided together; and the statute contained no express time limitation. *Williams v. State*, 2017 Ark. App. 287 (2017).

5-26-303. Domestic battering in the first degree.

(a) A person commits domestic battering in the first degree if:

(1) With the purpose of causing serious physical injury to a family or household member, the person causes serious physical injury to a family or household member by means of a deadly weapon;

(2) With the purpose of seriously and permanently disfiguring a family or household member or of destroying, amputating, or permanently disabling a member or organ of a family or household member's body, the person causes such an injury to a family or household member;

(3) The person causes serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life;

(4) The person knowingly causes serious physical injury to a family or household member he or she knows to be sixty (60) years of age or older or twelve (12) years of age or younger;

(5) The person:

(A) Commits any act of domestic battering as defined in § 5-26-304 or § 5-26-305; and

(B) For conduct that occurred within the ten (10) years preceding the commission of the current offense, the person has on two (2) previous occasions been convicted of any act of battery against a family or household member as defined by the laws of this state or by the equivalent laws of any other state or foreign jurisdiction;

(6) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member by means of a firearm; or

(7) The person knowingly causes serious physical injury to a family or household member who is four (4) years of age or younger under circumstances manifesting extreme indifference to the value of human life.

(b)(1) Domestic battering in the first degree is a Class B felony.

(2) However, domestic battering in the first degree is a:

(A) Class Y felony under subdivision (a)(2) or subdivision (a)(7) of this section; or

(B) Class A felony under subsection (a) of this section if:

(i) Committed against a woman the person knew or should have known was pregnant; or

(ii) The person committed one (1) or more of the following offenses within five (5) years of the offense of domestic battering in the first degree:

(a) Domestic battering in the first degree;

(b) Domestic battering in the second degree, § 5-26-304;

(c) Domestic battering in the third degree, § 5-26-305; or

(d) A violation of an equivalent penal law of this state or of another state or foreign jurisdiction.

History. Acts 1979, No. 396, § 1; A.S.A. 1947, § 41-1653; Acts 1995, No. 1291, § 1; 1999, No. 1317, § 2; 1999, No. 1365, § 1; 2001, No. 1553, § 8; 2003, No. 944, § 1; 2003, No. 1079, § 1; 2005, No. 1994, § 481; 2007, No. 671, § 1; 2009, No. 194, § 1; 2009, No. 748, § 16; 2011, No. 1120, § 7; 2013, No. 417, § 1; 2017, No. 301, § 1; 2019, No. 498, § 2.

Amendments. The 2017 amendment added (a)(6).

The 2019 amendment added (a)(7); inserted (b)(2)(A); redesignated part of (b)(2) as (b)(2)(B) and redesignated the remaining subdivisions accordingly; and deleted “upon a conviction” following “Class A felony” in the introductory language of (b)(2)(B).

CASE NOTES

ANALYSIS

Evidence of Prior Convictions.
Family or Household Member.

Evidence of Prior Convictions.

In a case in which a jury convicted defendant of first-degree domestic battering, the circuit court did not err by admitting evidence of defendant’s prior domestic-battering convictions during the guilt phase of the trial. The previous offenses were elements of first-degree domestic battering, not a sentence enhancement, and were properly proved during the guilt phase of the trial. *Crayton v. State*, 2018 Ark. App. 110, 543 S.W.3d 544 (2018).

Family or Household Member.

In a first-degree domestic battering case, the circuit court did not err in deny-

ing defendant’s motions for directed verdict because the evidence at trial showed that defendant was 22 years old when he shot the victim, who had been married to defendant’s mother when he was about seven or eight; defendant was between 13 and 15 years old when he stopped living with the victim based on the divorce between the victim and defendant’s mother; the victim stated that he continued to treat defendant like a son; defendant and the victim were persons who in the past had resided together; and the statute contained no express time limitation. *Williams v. State*, 2017 Ark. App. 287 (2017).

5-26-304. Domestic battering in the second degree.

CASE NOTES

Evidence.

There was sufficient evidence to support a conviction for domestic battery in the second degree under this section; although defendant contended that he was not in Arkansas on the night of the assault, his alibi was not found to be credible. There was enough streetlight and external apartment lighting for the victim to visually identify defendant as the assailant, and she also recognized defendant’s voice. *Harris v. State*, 2016 Ark. App. 23, 480 S.W.3d 229 (2016).

Trial court properly denied defendant’s motion for a directed verdict where the jury was free to believe the victim’s testimony that defendant was a household member living with her, knew that she was 65 years old, and struck her with a gun and seashell, thereby committing do-

mestic battering in the second degree under this section. *Neal v. State*, 2016 Ark. App. 384, 499 S.W.3d 254 (2016).

Evidence supported the second-degree domestic battering conviction where neighbors heard sounds of loud banging and yelling, and defendant beat the child with a leather belt repeatedly for at least five minutes, causing welts and lashings. *Jefferson v. State*, 2017 Ark. App. 492, 532 S.W.3d 75 (2017).

Evidence was sufficient to convict defendant of second-degree domestic battery because the victim testified that defendant said he was going to kill them both before intentionally yanking the steering wheel to the right and driving the car off the road; the victim’s testimony was bolstered by the eyewitnesses’ accounts that immediately after the couple changed

seats in the car, the car sped off and darted abruptly off the road; the officers observed no indications that defendant had attempted to brake or avoid the accident; and the jury heard testimony about the victim's previous conviction for filing a false credit-card application and was free to consider it when determining how much weight to give the victim's account of the accident. *Vines v. State*, 2018 Ark. App. 496, 562 S.W.3d 246 (2018).

Even though the victim testified at trial

that she initiated the fight with defendant, who was her husband, the evidence showed that she did not initially report her aggressive conduct to the officer, she was nervous and scared when she reported the incident, defendant apologized to her for his actions, and she suffered serious injuries to her face; thus, the evidence was sufficient to support defendant's conviction for second-degree domestic battery. *Allen v. State*, 2018 Ark. App. 603, 567 S.W.3d 93 (2018).

5-26-305. Domestic battering in the third degree.

(a) A person commits domestic battering in the third degree if:

(1) With the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member;

(2) The person recklessly causes physical injury to a family or household member;

(3) The person negligently causes physical injury to a family or household member by means of a deadly weapon; or

(4) The person purposely causes stupor, unconsciousness, or physical or mental impairment or injury to a family or household member by administering to the family or household member, without the family or household member's consent, any drug or other substance.

(b)(1) Domestic battering in the third degree is a Class A misdemeanor.

(2) However, domestic battering in the third degree is a Class D felony if:

(A) Committed against a woman the person knew or should have known was pregnant;

(B) The person committed one (1) or more of the following offenses within five (5) years of the offense of domestic battering in the third degree:

(i) Domestic battering in the first degree, § 5-26-303;

(ii) Domestic battering in the second degree, § 5-26-304;

(iii) Domestic battering in the third degree;

(iv) Aggravated assault on a family or household member, § 5-26-306; or

(v) A violation of an equivalent penal law of this state or of another state or foreign jurisdiction; or

(C) The person committed two (2) or more offenses of battery against a family or household member as defined by a law of this state or by an equivalent law of any other state or foreign jurisdiction within ten (10) years of the offense of domestic battering in the third degree.

History. Acts 1979, No. 396, § 3; A.S.A. 1999, No. 1365, § 3; 2001, No. 1553, § 10; 1947, § 41-1655; Acts 1995, No. 1291, § 3; 2003, No. 944, § 3; 2003, No. 1079, § 1;

2005, No. 1994, § 481; 2009, No. 333, § 1; 2013, No. 417, § 3; 2015, No. 1155, § 5. substituted “third degree” for “second degree” in (b)(2)(C).

Amendments. The 2015 amendment

CASE NOTES

ANALYSIS

Evidence.
Federal Law.

Evidence.

Suspension of an earlier sentence was properly revoked because defendant committed domestic battery in the third degree where an infant child suffered an arm fracture in defendant’s care, and a medical examination revealed healing fractures other places; moreover, there was evidence that other injury incidents had occurred while the child was in defendant’s care, and there was testimony that defendant was too rough with the child. The standard for reckless was what a reasonable person in the circumstances would have observed. *Singletary v. State*, 2013 Ark. App. 699 (2013).

Evidence was sufficient to support the revocation of a probationary sentence based on defendant’s commission of domestic battering in the third degree. Defendant’s boyfriend reported the incident to police, and photographs of his injuries were admitted into evidence without objection; defendant did not contest that her boyfriend was a household member or that his injuries met the statutory definition, and the boyfriend’s testimony was sufficient to show that defendant caused the injuries recklessly or purposefully. *Glennon v. State*, 2016 Ark. App. 25, 480 S.W.3d 894 (2016).

Testimony from the victim’s coworkers identifying the photographs of the marks they saw on the victim’s face just after her husband hit her, and evidence defendant fled when police arrived supported defendant’s conviction for third-degree domestic battery. *Donaldson v. State*, 2016 Ark. App. 391, 500 S.W.3d 768 (2016).

Evidence was sufficient to sustain a third-degree domestic battering conviction where the victim and defendant had lived together for about 11 years, her injuries required hospitalization, and the victim’s daughter’s testimony identified defendant as the person who caused the

victim’s injuries. *Bates v. State*, 2017 Ark. App. 123, 516 S.W.3d 275 (2017).

Sufficient evidence supported defendant’s conviction for domestic battery in the third degree because, regardless of the victim’s testimony, the evidence allowed the trial court to find defendant was a family or household member for purposes of this section. *Wheeler v. State*, 2017 Ark. App. 540, 532 S.W.3d 602 (2017).

In defendant’s prosecution for domestic battery in the third degree, proof that defendant purposely caused injury was sufficient because (1) the only contrary evidence was defendant’s testimony, which the trier of fact was permitted to disregard, and (2) the evidence allowed the trier of fact to find defendant did not act in self-defense. *Wheeler v. State*, 2017 Ark. App. 540, 532 S.W.3d 602 (2017).

Evidence was sufficient to convict defendant of third-degree domestic battering based on the testimony of the responding officer and the emergency room physician; the victim, defendant’s girlfriend, told the sergeant that the injuries to her leg were caused by the broad side of a machete wielded by defendant; and, while the doctor was taking her history concerning how she had been injured, she told him she had gotten into a verbal altercation with her boyfriend and tried to drive away; he attempted to open her car door with a machete; he then choked her and struck her multiple times with the flat side of the machete on her upper right leg; and then he struck her with a dumbbell. *Raheem v. State*, 2018 Ark. App. 620, 566 S.W.3d 148 (2018).

Where cross-examination of the victim at trial revealed that the State’s exhibit of text messages between the defendant and victim was incomplete and that the victim had deleted some of the messages, the appellate court did not have to decide whether the circuit court erred in failing to strike the exhibit because any error that existed was harmless given the overwhelming evidence of defendant’s guilt that remained. *Farmer v. State*, 2019 Ark. App. 148, 571 S.W.3d 78 (2019).

Federal Law.

Defendant's prior conviction of third-degree domestic battery under subdivision (a)(1) of this section was a violent felony for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C.

§ 924(e)(2)(B)(i); controlling precedent had determined that third-degree domestic battery was a violent felony under the ACCA's force clause. *United States v. Eason*, 907 F.3d 554 (8th Cir. 2018).

5-26-306. Aggravated assault on a family or household member.

(a) A person commits aggravated assault on a family or household member if, under circumstances manifesting extreme indifference to the value of human life, the person purposely:

(1) Engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member;

(2) Displays a firearm in a manner that creates a substantial danger of death or serious physical injury to a family or household member; or

(3) Impedes or prevents the respiration of a family or household member or the circulation of a family or household member's blood by applying pressure on the chest, throat, or neck or by blocking the nose or mouth of the family or household member.

(b) Aggravated assault on a family or household member is a Class D felony.

History. Acts 1979, No. 396, § 4; A.S.A. 1947, § 41-1656; Acts 1995, No. 1291, § 4; 2013, No. 418, § 1; 2019, No. 243, § 2.

Amendments. The 2019 amendment inserted "chest" in (a)(3), and made a stylistic change.

CASE NOTES**ANALYSIS**

Evidence.

Federal Law.

Evidence.

Defendant got angry, either loaded or cocked a rifle, put it in a place of easy access, and tried to have his father talk him out of "it," and given defendant's past history of violence, and his statements and demeanor, the act of preparing a gun to be used and the threat to use it were sufficient to satisfy the statute concerning aggravated assault on a family or household member. *Cauffiel v. State*, 2013 Ark. App. 642 (2013).

Federal Law.

Defendant's Arkansas conviction for aggravated assault on a family member un-

der subdivision (a)(3) of this section was a violent felony under the Armed Career Criminal Act's force clause, 18 U.S.C. § 924(e)(2)(B)(i); the Arkansas statute's element of impeding respiration or blood circulation by applying pressure on the throat or neck or by blocking the nose or mouth necessarily required the use of violent force, and the statute required that defendant act purposely. *United States v. Pyles*, 888 F.3d 1320 (8th Cir.), cert. denied, 139 S. Ct. 270, 202 L. Ed. 2d 180 (2018).

Cited: *Ta v. State*, 2015 Ark. App. 220, 459 S.W.3d 325 (2015).

5-26-308. Second degree assault on family or household member.

CASE NOTES

ANALYSIS

Sentence.

Sufficient Evidence.

Sentence.

Defendant's sentence for second-degree assault against a family member was modified to 90 days, to be served concurrently with his 15-year sentence for the burglary, because the trial court erred in sentencing him to one year of imprisonment since the sentence could not exceed 90 days. *Davis v. State*, 2015 Ark. App. 234, 459 S.W.3d 821 (2015).

Sufficient Evidence.

Even though defendant was not convicted of second-degree assault, there was

sufficient evidence that he entered the owner's home to commit that offense, as the owner saw defendant swinging at his wife inside the home after he chased her there with a knife, and thus there was a substantial risk of injury to the wife, which showed defendant's intent; defendant's residential burglary conviction was supported by substantial evidence. *Whitfield v. State*, 2014 Ark. App. 380, 438 S.W.3d 289 (2014).

Defendant was properly convicted of second-degree assault against a family member because there was substantial evidence that he entered the victim's home with the purpose of assaulting her. *Davis v. State*, 2015 Ark. App. 234, 459 S.W.3d 821 (2015).

5-26-314. Unlawful distribution of sexual images or recordings.

(a) A person commits the offense of unlawful distribution of sexual images or recordings if, being eighteen (18) years of age or older, with the purpose to harass, frighten, intimidate, threaten, or abuse another person, the actor distributes an image, picture, video, or voice or audio recording of the other person to a third person by any means if the image, picture, video, or voice or audio recording:

(1) Is of a sexual nature or depicts the other person in a state of nudity; and

(2) The other person is a family or household member of the actor or another person with whom the actor is in a current or former dating relationship.

(b) The fact that an image, picture, video, or voice or audio recording was created with the knowledge or consent of the other person or that the image, picture, video, or voice or audio recording is the property of a person charged under this section is not a defense to prosecution under this section.

(c) Unlawful distribution of sexual images or recordings is a Class A misdemeanor.

(d)(1) Upon the pretrial release of a person charged under this section, the court shall enter an order consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the person charged under this section of the penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(2) An order under subdivision (d)(1) of this section remains in effect during the pendency of any appeal of a conviction under this section.

History. Acts 2015, No. 304, § 2.

SUBCHAPTER 5 — CUSTODY AND VISITATION

5-26-502. Interference with court-ordered custody.

CASE NOTES

Out-of-State Custody Order.

Defendant was properly convicted of interference with custody under this section for not returning his children to his ex-wife pursuant to a Pennsylvania custody order; the fact that the order had not yet been registered in Arkansas for 10

days under § 9-19-305 did not bar a criminal prosecution, as that requirement only applied in a civil enforcement action. Sections 9-19-303(b) and 9-19-315 further support this result. Longeway v. State, 2018 Ark. App. 356, 553 S.W.3d 180 (2018).

5-26-503. Interference with custody.

CASE NOTES

Sufficient Evidence.

Sufficient evidence supported defendant’s residential burglary and interference with custody convictions given the trial testimony that he forced open the

victim’s apartment door and took her child against her will (no-merit brief). Kelley v. State, 2019 Ark. App. 71, 568 S.W.3d 801 (2019).

CHAPTER 27

OFFENSES AGAINST CHILDREN OR INCOMPETENTS

SUBCHAPTER.

- 2. OFFENSES GENERALLY.
- 3. ARKANSAS PROTECTION OF CHILDREN AGAINST EXPLOITATION ACT OF 1979.
- 6. COMPUTER CRIMES AGAINST MINORS.

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-27-205. Endangering the welfare of a minor in the first degree.
- 5-27-211. Re-homing of an adopted minor.
- 5-27-227. Providing minors with tobacco products, vapor products, alternative nicotine products, e-liquid products,

SECTION.

- and cigarette papers — Purchase, use, or possession prohibited — Self-service displays prohibited — Placement of tobacco vending machines.
- 5-27-233. [Repealed.]

Effective Dates. Acts 2015, No. 1235, § 34: Emergency clause failed to pass. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the state must be able to plan and give effective

notice for the new comprehensive permits created by this act; that it is essential to the operation of Arkansas Tobacco Control and the tobacco, vapor product, and alternative nicotine product industry that this act be effective on the renewal date for

permits issued by Arkansas Tobacco Control to ensure proper funding for the enforcement of the new regulations and requirements of this act; that a delay in the effectiveness of this act after the renewal date of permits and regulations issued by Arkansas Tobacco Control may cause irreparable harm upon the proper administration and provision of essential governmental programs; and that this act is necessary to ensure that the industry and the citizens of Arkansas are provided

guidance regarding permits for vapor products and alternative nicotine products. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health, and safety shall become effective on May 1, 2015.”

Acts 2019, No. 580, § 18: Sept. 1, 2019. Effective date clause provided: “Sections 2-17 of this act are effective on the first day of the second calendar month following the effective date of this act”.

5-27-205. Endangering the welfare of a minor in the first degree.

(a) A person commits the offense of endangering the welfare of a minor in the first degree if, being a parent, guardian, person legally charged with care or custody of a minor, or a person charged with supervision of a minor, he or she purposely:

(1) Engages in conduct creating a substantial risk of death or serious physical injury to a minor; or

(2) Deserts a minor less than ten (10) years old under circumstances creating a substantial risk of death or serious physical injury.

(b) Endangering the welfare of a minor in the first degree is a Class D felony.

(c)(1) It is an affirmative defense to a prosecution under this section that a parent voluntarily delivered a child to and left the child with, or voluntarily arranged for another person to deliver a child to and leave the child with, a medical provider, law enforcement agency, or fire department as provided in § 9-34-201 et seq.

(2)(A) Subdivision (c)(1) of this section does not create a defense to any prosecution arising from any conduct other than the act of delivering a child as described in subdivision (c)(1) of this section.

(B) Subdivision (c)(1) of this section specifically does not constitute a defense to any prosecution arising from an act of abuse or neglect committed before the delivery of a child to a medical provider, law enforcement agency, or fire department as provided in § 9-34-201 et seq.

History. Acts 1975, No. 280, § 2407; A.S.A. 1947, § 41-2407; Acts 2001, No. 236, § 2; 2005, No. 2207, § 1; 2019, No. 185, § 1.

Amendments. The 2019 amendment inserted “or fire department” in (c)(1) and

(c)(2)(B); substituted “Subdivision (c)(1) of this section does not” for “Nothing in subdivision (c)(1) of this section shall be construed to” in (c)(2)(A); and made stylistic changes.

RESEARCH REFERENCES

ALR. Criminal Prosecutions and Civil Actions for Leaving Child in Unattended

Hot or Cold Vehicle, 26 A.L.R.7th Art. 5 (2018).

CASE NOTES

ANALYSIS

Illustrative Cases.
Jury Instructions.

Illustrative Cases.

Evidence that defendant saw the infant seizing and appearing lifeless, as evidenced by the videos he recorded on his phone, but that it was two days before the infant was taken to the doctor was sufficient to support defendant's conviction for first-degree endangering the welfare of a minor. *Snow v. State*, 2018 Ark. App. 612, 568 S.W.3d 290 (2018).

Because the juvenile was not "charged with supervision of a minor" as set forth in this section, she was not in the class of persons who could commit the offense of first-degree endangering the welfare of a minor, and thus she could not be principally culpable for committing the offense. The juvenile's sister, and not the juvenile, was identified as the babysitter of the

one-year-old child. And because the juvenile, and not her sister, was the person who sparked the stun gun at the child, she could not be charged as an accomplice and therefore her adjudication was reversed. *K.F. v. State*, 2019 Ark. App. 312, 578 S.W.3d 324 (2019).

Jury Instructions.

Trial court did not err in instructing the jury because, even assuming endangering the welfare of a minor in the third degree was a lesser-included offense of endangering the welfare of a minor in the first degree, there was not a rational basis for giving the instruction. By defendant's own testimony, defendant's actions were not reckless—they were actions that defendant purposely undertook after defendant became upset and frustrated when an infant child would not stop crying, which resulted in serious injury to the child. *Myers v. State*, 2016 Ark. App. 501, 505 S.W.3d 694 (2016).

5-27-206. Endangering the welfare of a minor in the second degree.

RESEARCH REFERENCES

ALR. Criminal Liability of Nonparent for Failure to Obtain Medical Treatment for Minor Based on Duty of One Acting in Loco Parentis. 97 A.L.R.6th 539 (2014).

Criminal Prosecutions and Civil Actions for Leaving Child in Unattended Hot or Cold Vehicle, 26 A.L.R.7th Art. 5 (2018).

5-27-207. Endangering the welfare of a minor in the third degree.

RESEARCH REFERENCES

ALR. Criminal Liability of Nonparent for Failure to Obtain Medical Treatment

for Minor Based on Duty of One Acting in Loco Parentis. 97 A.L.R.6th 539 (2014).

CASE NOTES

Recklessness.

Trial court did not err in instructing the jury because, even assuming endangering the welfare of a minor in the third degree was a lesser-included offense of endangering the welfare of a minor in the first degree, there was not a rational basis for giving the instruction. By defendant's own

testimony, defendant's actions were not reckless—they were actions that defendant purposely undertook after defendant became upset and frustrated when an infant child would not stop crying, which resulted in serious injury to the child. *Myers v. State*, 2016 Ark. App. 501, 505 S.W.3d 694 (2016).

5-27-211. Re-homing of an adopted minor.

(a) As used in this section:

(1) “Adopted minor” means a person who is:

(A) Less than eighteen (18) years of age; and

(B) The subject of an adoption decree that is valid under the law of this state or another state, or foreign or international law; and

(2) “Relative” means a person within the fifth degree of consanguinity by virtue of blood or adoption.

(b) A person commits the offense of re-homing of a minor if he or she knowingly engages in:

(1)(A) A transaction or an action taken to facilitate a transaction through electronic means or otherwise by an adoptive parent, an individual, or an entity having custody of an adopted minor that is taken:

(i) Without court approval; and

(ii) Except as provided under subsection (c) of this section, to avoid permanent parental responsibility by placing the minor in the physical custody of another person or entity.

(B) As used in subdivision (b)(1)(A) of this section, “transaction” includes without limitation transferring, advertising, recruiting, harboring, transporting, providing, soliciting, or obtaining a minor;

(2) The selling, transferring, or arranging for the sale or transfer of a minor to another person or entity for money or anything of value or to receive a minor for money or anything of value; or

(3) Assisting, aiding, abetting, or conspiring in the commission of an act described in subdivision (b)(1) or subdivision (b)(2) of this section by a person or an entity, regardless of whether money or anything of value has been promised to or received by the person or entity.

(c) This section does not apply to:

(1) A person who places a minor with a relative, stepparent, an agency licensed under the Child Welfare Agency Licensing Act, § 9-28-401 et seq., a licensed attorney, or the Department of Human Services;

(2) Placement of a minor by a licensed attorney, an agency licensed under the Child Welfare Agency Licensing Act, § 9-28-401 et seq., or the Department of Human Services;

(3) Temporary placement of a minor by a parent or custodian for a designated short-term period with a specified intent and time period for return of the minor if the temporary placement is due to a vacation or a school-sponsored function or activity, or the incarceration, military service, medical treatment, or incapacity of a parent or guardian;

(4) Placement of a minor in accordance with the requirements of the Interstate Compact on the Placement of Children, § 9-29-201 et seq.; or

(5) Relinquishment of a minor under the voluntary delivery of a child law, under § 9-34-201 et seq.

(d) Re-homing of a minor is an unclassified felony with a term of imprisonment of not more than five (5) years and a fine of not more than five thousand dollars (\$5,000).

(e) It is not a defense to prosecution for a violation of this section that the adoptive parent solicited, advertised, or recruited through electronic means or otherwise and recruited a person that is:

(1) A law enforcement officer acting within the official scope of his or her duties; and

(2) Posing as a person willing to accept placement of an adopted minor.

History. Acts 2015, No. 1092, § 1.

5-27-221. Permitting abuse of a minor.

CASE NOTES

Sex Offender.

Circuit court did not err in finding that it lacked discretion to order defendant to register as a sex offender because she pleaded guilty to permitting abuse of a minor, which was listed as a sex offense in

the sex offender statute, and defendant failed to obtain a ruling from the circuit court on her overbreadth arguments. *Pedraza v. State*, 2015 Ark. App. 205, 465 S.W.3d 426 (2015).

5-27-227. Providing minors with tobacco products, vapor products, alternative nicotine products, e-liquid products, and cigarette papers — Purchase, use, or possession prohibited — Self-service displays prohibited — Placement of tobacco vending machines.

(a)(1) It is unlawful for any person to give, barter, or sell to a minor:

(A) Tobacco in any form;

(B) Cigarette paper; or

(C) A vapor product, alternative nicotine product, e-liquid product, or any component of a vapor product, alternative nicotine product, or e-liquid product.

(2) Except as provided in subdivision (a)(3) of this section, a person who pleads guilty or nolo contendere to or is found guilty of violating subdivision (a)(1) of this section is guilty of a Class A misdemeanor.

(3) An employee or owner of a retail location permitted under § 26-57-215 who violates subdivision (a)(1) of this section while inside the retail location upon conviction is subject to a fine not to exceed one hundred dollars (\$100) per violation.

(b)(1) It is unlawful for a minor to:

(A) Use or possess or to purchase, or attempt to purchase:

(i) Tobacco in any form;

(ii) Cigarette papers; or

(iii) A vapor product, alternative nicotine product, e-liquid product, or any component of a vapor product, alternative nicotine product, or e-liquid product; or

(B) For the purpose of obtaining or attempting to obtain tobacco in any form, a vapor product, alternative nicotine product, e-liquid

product, any component of a vapor product, alternative nicotine product, or e-liquid product, or cigarette papers, falsely represent himself or herself not to be a minor by displaying proof of age that is false, fraudulent, or not actually proof of the minor's age.

(2) Any cigarettes, tobacco products, or cigarette papers found in the possession of a minor may be confiscated and destroyed by a law enforcement officer.

(c)(1) It is not an offense under subsection (b) of this section if:

(A) The minor was acting at the direction of an authorized agent of Arkansas Tobacco Control to enforce or ensure compliance with laws relating to the prohibition of the sale of tobacco in any form, a vapor product, alternative nicotine product, e-liquid product, any component of a vapor product, alternative nicotine product, or e-liquid product, or cigarette papers to minors;

(B) The minor was acting at the direction of an authorized agent of the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services to compile statistical data relating to the sale of tobacco in any form, a vapor product, alternative nicotine product, e-liquid product, any component of a vapor product, alternative nicotine product, or e-liquid product, or cigarette papers to minors;

(C) The minor was acting at the request of an Arkansas Retail Cigarette, Tobacco, Vapor Product, and Alternative Nicotine Product permit holder or a retail exclusive vapor product and alternative nicotine product store permit holder to assist the permit holder by performing a check on the permit holder's own retail business to see if the permit holder's employees would sell tobacco, a vapor product, alternative nicotine product, e-liquid product, any component of a vapor product, alternative nicotine product, or e-liquid product, or cigarette papers to the minor; or

(D) The minor was acting as an agent of a retail permit holder within the scope of employment.

(2) A minor performing activities under subdivision (c)(1) of this section shall:

(A) Display the appearance of a minor;

(B) Have the written consent of the minor's parent or guardian to perform the activity on file with the agency utilizing the minor; and

(C)(i) Present a true and correct identification if asked.

(ii) Any failure on the part of a minor to provide true and correct identification upon request is a defense to any action under this section or a civil action under § 26-57-256.

(d) Any person who sells tobacco in any form, a vapor product, alternative nicotine product, e-liquid product, any component thereof, or a cigarette paper has the right to deny the sale of any tobacco in any form, a vapor product, alternative nicotine product, e-liquid product, any component of a vapor product, alternative nicotine product, or e-liquid product, or a cigarette paper to any person.

(e) It is unlawful for any person who has been issued a permit or a license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-

201 et seq., to fail to display in a conspicuous place or on each vending machine a sign indicating that the sale of tobacco products, vapor products, alternative nicotine products, e-liquid products, or any component of a vapor product, alternative nicotine product, or e-liquid product to or purchase or possession of tobacco products by a minor is prohibited by law.

(f) It is unlawful for any manufacturer whose tobacco product, vapor product, alternative nicotine product, e-liquid product, or any component of a vapor product, alternative nicotine product, or e-liquid product is distributed in this state and any person who has been issued a permit or license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., to distribute a free sample of any tobacco product, vapor product, alternative nicotine product, e-liquid product, or any component of a vapor product, alternative nicotine product, or e-liquid product or coupon that entitles the holder of the coupon to any free sample of any tobacco product, vapor product, alternative nicotine product, e-liquid product, or any component of a vapor product, alternative nicotine product, or e-liquid product:

(1) In or on any public street or sidewalk within five hundred feet (500') of any playground, public school, or other facility when the playground, public school, or other facility is being used primarily by minors for recreational, educational, or other purposes; or

(2) To any minor.

(g)(1)(A) It is unlawful for any person that has been issued a permit or license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., to sell or distribute a cigarette product, vapor product, alternative nicotine product, e-liquid product, or any component of a vapor product, alternative nicotine product, or e-liquid product through a self-service display.

(B) Subdivision (g)(1)(A) of this section does not apply to a:

(i) Vending machine that complies with subdivision (h)(1)(A) of this section;

(ii) Retail tobacco store; or

(iii) Retail exclusive vapor product or alternative nicotine product store.

(2) As used in subdivision (g)(1) of this section:

(A) "Retail exclusive vapor product or alternative nicotine product store" means the same as defined in § 26-57-203;

(B) "Retail tobacco store" means a retail store utilized primarily for the sale of tobacco products, other than vapor products, alternative nicotine products, e-liquid products, and accessories, and in which the sale of other products is merely incidental; and

(C) "Self-service display" means a display:

(i) That contains a cigarette product, vapor product, alternative nicotine product, e-liquid product, or any component of a vapor product, alternative nicotine product, or e-liquid product;

(ii) That is located in an area where customers are permitted; and

(iii) In which the cigarette product, vapor product, alternative nicotine product, e-liquid product, or any component of a vapor

product, alternative nicotine product, or e-liquid product is readily accessible to a customer without the assistance of a salesperson.

(h)(1)(A) Except as provided in subdivision (h)(2) of this section, it is unlawful for any person who owns or leases a tobacco, vapor product, alternative nicotine product, or e-liquid product vending machine to place a tobacco, vapor product, alternative nicotine product, or e-liquid product vending machine in a public place.

(B) As used in subdivision (h)(1)(A) of this section, “public place” means a publicly or privately owned place to which the public or a substantial number of people have access.

(2) A tobacco, vapor product, alternative nicotine product, or e-liquid product vending machine may be placed in a:

(A) Restricted area within a factory, business, office, or other structure to which a member of the general public is not given access;

(B) Permitted premises that has a permit for the sale or dispensing of an alcoholic beverage for on-premises consumption that restricts entry to a person twenty-one (21) years of age or older; or

(C) Place where the tobacco, vapor product, alternative nicotine product, or e-liquid product vending machine is under the supervision of the owner or an employee of the owner.

(i) Any retail permit holder or license holder who violates any provision in this section is deemed guilty of a violation and subject to penalties under § 26-57-256.

(j)(1) A notice of alleged violation of this section shall be given to the holder of a retail permit or license or an agent of the holder within ten (10) days of the alleged violation.

(2)(A) The notice shall contain the date and time of the alleged violation.

(B)(i) The notice shall also include either the name of the person making the alleged sale or information reasonably necessary to determine the location in the store that allegedly made the sale.

(ii) When appropriate, information under subdivision (j)(2)(B)(i) of this section should include, but not be limited to, the:

(a) Cash register number;

(b) Physical location of the sale in the store; and

(c) If possible, the lane or aisle number.

(k) Notwithstanding the provisions of subsection (i) of this section, the court shall consider the following factors when reviewing a possible violation:

(1) The business has adopted and enforced a written policy against selling cigarettes, tobacco products, vapor products, alternative nicotine products, or e-liquid products to minors;

(2) The business has informed its employees of the applicable laws regarding the sale of cigarettes, tobacco products, vapor products, alternative nicotine products, and e-liquid products to minors;

(3) The business has required employees to verify the age of a cigarette, tobacco product, vapor product, alternative nicotine product, or e-liquid product customer by way of photographic identification;

(4) The business has established and imposed disciplinary sanctions for noncompliance; and

(5) That the appearance of the purchaser of the tobacco in any form, vapor product, alternative nicotine product, e-liquid product, or cigarette papers was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase.

(1) A person convicted of violating any provision of this section whose permit or license to distribute or sell a tobacco product, vapor product, alternative nicotine product, or e-liquid product is suspended or revoked upon conviction shall surrender to the court any permit or license to distribute or sell a tobacco product, and the court shall transmit the permit or license to distribute or sell a tobacco product, vapor product, alternative nicotine product, or e-liquid product to the Director of Arkansas Tobacco Control:

(1) To suspend or revoke the person's permit or license to distribute or sell a tobacco product, vapor product, alternative nicotine product, or e-liquid product and to not renew the permit or license; and

(2) Not to issue any new permit or license to that person for the period of time determined by the court in accordance with this section.

(m)(1) As used in this section, "minor" means a person who is under twenty-one (21) years of age.

(2) "Minor" does not include a person who:

(A) Is under twenty-one (21) years of age if the person presents a military identification card establishing that he or she is a member of the United States Armed Forces; or

(B) Has attained nineteen (19) years of age as of December 31, 2019.

History. Acts 1929, No. 152, § 26; Pope's Dig., § 13557; A.S.A. 1947, § 41-2465; Acts 1991, No. 543, § 1; 1997, No. 1337, § 24; 1999, No. 1591, §§ 1, 3; 2003, No. 846, § 1; 2007, No. 165, § 1; 2009, No. 748, § 17; 2009, No. 785, § 6; 2013, No. 1107, § 1; 2015, No. 1235, § 30; 2017, No. 913, § 16; 2019, No. 580, §§ 2, 3.

Publisher's Notes. The definition of "Retail exclusive vapor product and alternative nicotine product store", referred to in subdivision (g)(2)(A) of this section, was deleted from § 26-57-203 by Acts 2019, No. 1071, § 6.

Amendments. The 2015 amendment inserted "vapor products, alternative nicotine products, e-liquid products" in the section heading; and rewrote the section.

The 2017 amendment substituted "Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services" for "Division of Behavioral Health Services" in (c)(1)(B).

The 2019 amendment substituted "not to be a minor" for "to be eighteen (18) years of age or older" in (b)(1)(B); and added (m).

5-27-233. [Repealed.]

A.C.R.C. Notes. This section was amended by Acts 2015, No. 1155, § 6. However, it was specifically repealed by Acts 2015, No. 1235, § 33. Acts 2015, No. 1235, § 33, also controls pursuant to § 1-2-207(b) and Acts 2015, No. 1155, § 17.

Publisher's Notes. This section, which prohibited the providing of e-cigarettes and e-cigarette products to minors, was repealed by Acts 2015, No. 1235, § 33. This section was derived from Acts 2013, No. 1451, § [1]; 2015, No. 1155, § 6.

For current law, see § 5-27-227.

SUBCHAPTER 3 — ARKANSAS PROTECTION OF CHILDREN AGAINST EXPLOITATION ACT OF 1979

SECTION.

5-27-306. Internet stalking of a child.

5-27-306. Internet stalking of a child.

(a) A person commits the offense of internet stalking of a child if the person being twenty-one (21) years of age or older knowingly uses a computer online service, internet service, local internet bulletin board service, or any means of electronic communication to:

(1) Seduce, solicit, lure, or entice a child fifteen (15) years of age or younger in an effort to arrange a meeting with the child for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity;

(2) Seduce, solicit, lure, or entice an individual that the person believes to be fifteen (15) years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity;

(3) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, email address, residence address, picture, physical description, characteristics, or any other identifying information on a child fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the child for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity;

(4) Compile, transmit, publish, reproduce, buy, sell, receive, exchange, or disseminate the name, telephone number, email address, residence address, picture, physical description, characteristics, or any other identifying information on an individual that the person believes to be fifteen (15) years of age or younger in furtherance of an effort to arrange a meeting with the individual for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity; or

(5) Arrange a meeting with another person who holds himself or herself out as the parent, guardian, family member, or other person of authority over a child fifteen (15) years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger in order to seduce, solicit, lure, or entice the child fifteen (15)

years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger for the purpose of engaging in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity.

(b) Internet stalking of a child is a:

(1) Class B felony if the person attempts to arrange a meeting with:

(A) A child fifteen (15) years of age or younger, even if a meeting with the child never takes place;

(B) An individual that the person believes to be fifteen (15) years of age or younger, even if a meeting with the individual never takes place; or

(C) A person who holds himself or herself out as the parent, guardian, family member, or other person of authority over a child fifteen (15) years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger, even if a meeting with the person never takes place; or

(2) Class Y felony if the person arranges a meeting with a child fifteen (15) years of age or younger or an individual that the person believes to be fifteen (15) years of age or younger and an actual meeting with the child or the individual takes place, even if the person fails to engage the child or individual in:

- (A) Sexual intercourse;
- (B) Sexually explicit conduct; or
- (C) Deviate sexual activity.

(c) This section does not apply to a person or entity providing an electronic communications service to the public that is used by another person to violate this section, unless the person or entity providing an electronic communications service to the public:

- (1) Conspires with another person to violate this section; or
- (2) Knowingly aids and abets a violation of this section.

History. Acts 2005, No. 1776, § 1; 2007, No. 38, § 2; 2007, No. 827, §§ 36, 37; 2017, No. 371, § 1.

Amendments. The 2017 amendment inserted “or any means of electronic communication” in the introductory language of (a); substituted “email” for “electronic mail” in (a)(3) and (a)(4); added (a)(5); redesignated former (b)(1) as the intro-

ductory language of (b)(1) and (b)(1)(A); rewrote and redesignated former (b)(2) as (b)(1)(B); added (b)(1)(C); redesignated former (b)(3) as present (b)(2); in (b)(2), substituted “Class Y” for “Class A” and inserted “or an individual that the person believes to be fifteen (15) years of age or younger”, “or the individual” and “or individual”, and made stylistic changes.

RESEARCH REFERENCES

ALR. Validity of State Stalking Statutes. 6 A.L.R.7th Art. 6 (2015).

Validity, Construction, and Application

of State Cyberstalking Laws, 26 A.L.R.7th Art. 6 (2018).

CASE NOTES

ANALYSIS

Construction.

—Former Version of Section.

Appellate Review.

Entrapment As Affirmative Defense.

Evidence.

Requirements.

Construction.**—Former Version of Section.**

Although the 2016 text messages defendant sent to a police officer acting as a 14-year-old child were sent over phone lines, substantial evidence supported defendant's conviction for internet stalking of a child under the plain language of the 2016 version of this section because a police officer testified that the picture of a child that was sent to defendant was sent over the internet; defendant's text messages demonstrated that he believed "the child" was 14 years old and he arranged a meeting with "the child" for sex after receiving the picture and thus the State presented evidence that the picture was received in furtherance of an effort to arrange a meeting with the child under subdivision (a)(4) of this section. *Duren v. State*, 2018 Ark. App. 68, 544 S.W.3d 555 (2018) (decision under prior version of section).

While the 2017 amendment to this section broadened its reach beyond the use of the internet, the amendment lacked the significance claimed by defendant because substantial evidence supported the jury's conclusion that defendant used the internet when he exchanged photographs with "the child". *Duren v. State*, 2018 Ark. App. 68, 544 S.W.3d 555 (2018) (decision under prior version of section).

Appellate Review.

Defendant claimed the State was remiss in not complaining at the time of his closing argument that the State's case should be reopened, but the rule states that it is the appellant's duty to strictly comply, offering the motion to dismiss in a time and manner so the State might have the opportunity to reopen its case if the circuit court deems it necessary; when defendant failed to comply with the rule by arguing his case with no specificity at

the time of the dismissal motion, the circuit court was not given the chance to rule on that issue, and the claim that the State failed to prove an element of the crime of internet stalking of a child was not preserved. *Hendrix v. State*, 2014 Ark. App. 696, 450 S.W.3d 692 (2014).

Entrapment As Affirmative Defense.

Trial court did not err in denying defendant's motions for a directed verdict on the ground of entrapment where there were factual issues to be decided by the jury as to whether the conduct of law enforcement would have caused a law-abiding citizen to commit internet stalking of a child. *Squyres v. State*, 2015 Ark. App. 665, 476 S.W.3d 839 (2015).

Evidence.

Defendant and a person he believed to be a 15-year-old girl exchanged 846 messages, but the passages did not support that defendant made a determined attempt to arrange a meeting with the girl, and although his messages posed hypotheticals, he declined the girl's request to meet several times; the trial court erred in denying his motion for a directed verdict. *Holcomb v. State*, 2014 Ark. 141, 432 S.W.3d 600 (2014).

Evidence was sufficient to support a conviction under subdivision (a)(2) of this section where the chat log showed that defendant believed the undercover agent was only 15. *Squyres v. State*, 2015 Ark. App. 665, 476 S.W.3d 839 (2015).

Conversations defendant had with with a 14-year-old female on an adult social-networking website failed to support defendant's conviction for internet stalking of a child because during the conversations, defendant believed he was communicating with a 26-year-old female and no meeting was arranged. *Duren v. State*, 2018 Ark. App. 68, 544 S.W.3d 555 (2018).

There was substantial evidence to support the jury's finding that when defendant and a police officer posing as a child exchanged pictures, defendant used the internet because the officer, who was qualified as an expert witness in extracting data from computers and mobile devices, testified that the pictures that defendant and "the child" exchanged had been sent over the internet. *Duren v.*

State, 2018 Ark. App. 68, 544 S.W.3d 555 (2018) (decision under prior version of section).

Requirements.

Applying the ordinary definitions of the terms effort, arrange, and meeting, defen-

dant must have made a determined attempt to plan a coming together with a girl he believed was 15 years old, for purposes of his internet stalking of a child conviction. *Holcomb v. State*, 2014 Ark. 141, 432 S.W.3d 600 (2014).

SUBCHAPTER 6 — COMPUTER CRIMES AGAINST MINORS

SECTION.

5-27-609. Possession of sexually explicit digital material.

5-27-601. Definitions.

CASE NOTES

Lewd Exhibition.

Images of nude children were lewd for purposes of subdivision (15)(F) of this section and § 5-27-602 because they were designed to elicit a sexual response in a pedophile viewer; in this case, defendant

admitted that he masturbated while looking at the photographs and identified which of them was his favorite for that purpose. *Hayes v. State*, 2013 Ark. App. 725 (2013).

5-27-602. Distributing, possessing, or viewing of matter depicting sexually explicit conduct involving a child.

CASE NOTES

ANALYSIS

Construction.
Consecutive Sentences.
Double Jeopardy.
Evidence Sufficient.
Guilty Pleas.
Multiple Charges.
Sexually Explicit Conduct.
Writ of Error Coram Nobis.

Construction.

Plain language of this section demonstrates that the General Assembly unambiguously intends that each act of possession is a discrete and independent offense. Consequently, this section authorizes separate convictions for each prohibited photograph and videotape that is possessed. *Rea v. State*, 2015 Ark. 431, 474 S.W.3d 493 (2015).

Consecutive Sentences.

Trial court did not abuse its discretion by ordering defendant's sentences for 20 counts of distributing, possessing, or viewing matter depicting sexually explicit con-

duct involving a child to run consecutively because there was no indication that the trial court failed to consider factors urged by the defense, each sentence was within the statutory range of punishment, and no exception applied. *Steele v. State*, 2014 Ark. App. 257, 434 S.W.3d 424 (2014).

Double Jeopardy.

This section does not impose multiple prosecutions for the same offense in violation of the double jeopardy clause. Instead, this section permits separate prosecutions for the knowing possession of "any" prohibited photograph or videotape. *Rea v. State*, 2015 Ark. 431, 474 S.W.3d 493 (2015).

Circuit court properly denied defendant's petition for writ of habeas corpus because a conviction for each photograph sent by defendant did not violate double jeopardy, even though he sent only one email with one attachment. The number of charges brought against defendant was authorized by the legislature, defendant did not dispute that the email he sent contained 30 separate photographs de-

picting children engaging in sexually explicit conduct, and, although “computer file” is included in the list of media in subdivision (a)(1) of this section, the fact that the 30 photographs were attached to the email in a single file was not relevant where it is the number of photographs distributed, not the manner of distribution, that gives rise to the number of permissible charges. *Pelletier v. Kelley*, 2018 Ark. 347, 561 S.W.3d 730 (2018).

For double jeopardy purposes, there is no distinction between possession under subdivision (a)(2) of this section and the prohibited activities listed in subdivision (a)(1) of this section. Each photograph that is distributed in violation of subdivision (a)(1) can support a separate charge. *Pelletier v. Kelley*, 2018 Ark. 347, 561 S.W.3d 730 (2018).

Evidence Sufficient.

Evidence was sufficient to support defendant's convictions of 20 counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child because it showed that he exercised dominion and control over the computer, as it belonged to him, the IP address was registered to him, it was kept in his bedroom, it held personal pictures and private email accounts, and defendant said that he had recently updated the antivirus software on the computer. *Steele v. State*, 2014 Ark. App. 257, 434 S.W.3d 424 (2014).

Evidence supported defendant's convictions of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child; there was substantial evidence that defendant exercised dominion and control over the computers that were seized from his residence, and there was no claim that anyone else lived with defendant or had access to the computer, and there was substantial evidence that defendant knowingly possessed the images and videos of child pornography saved on his computer. *Bishop v. State*, 2015 Ark. App. 436, 467 S.W.3d 763 (2015).

Evidence was sufficient to sustain defendant's convictions for child pornography possession under this section where even assuming joint access to the computers on which the images were found, the evidence showed that defendant exercised dominion and control over the computers

and hard drives, and his attempt to prevent officers from finding evidence on one hard drive by unplugging cables from the device, thereby encrypting the information contained on it, was properly regarded as evidence of consciousness of guilt. *Allen v. State*, 2016 Ark. App. 264, 492 S.W.3d 871 (2016).

There was sufficient evidence to support defendant's convictions for possession of child pornography because the two computers that contained images of child pornography were found in a computer file that contained defendant's name, a detective testified that each picture of the children appeared to depict a prepubescent female, and the jury was provided with the pictures. *Whitney v. State*, 2017 Ark. App. 341 (2017).

Considering the evidence in the light most favorable to the bench trial verdict, substantial evidence supported defendant's convictions for 10 counts of possessing, viewing, or distributing materials containing sexually explicit conduct involving a minor child; defendant did not object to the authenticity of the screenshots at trial, and no speculation or conjecture was necessary on the record presented. *Manek v. State*, 2019 Ark. App. 214, 575 S.W.3d 436 (2019).

Guilty Pleas.

Trial court, upon resentencing, properly ordered defendant to register as a sex offender because, by pleading guilty to distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child, defendant was ineligible for any sentence under the First Offender Act and was required by law to comply with the statutory sex-offender-registration requirements. *Wilson v. State*, 2019 Ark. App. 116 (2019).

Multiple Charges.

Neither at trial nor on direct appeal did petitioner challenge his multiple charges under subdivision (a)(2) of this section, and thus his claim that the trial court incorrectly concluded that he could be charged with multiple counts was not cognizable. *Bishop v. State*, 2017 Ark. App. 435 (2017).

Sexually Explicit Conduct.

Images of nude children were lewd for purposes of § 5-27-601(15)(F) and this section because they were designed to

elicit a sexual response in a pedophile viewer; in this case, defendant admitted that he masturbated while looking at the photographs and identified which of them was his favorite for that purpose. *Hayes v. State*, 2013 Ark. App. 725 (2013).

Writ of Error Coram Nobis.

Where petitioner contended in his request for a writ of error coram nobis that his guilty plea to thirty crimes under this section was illegal because he had sent only one computer file, the circuit court properly denied the petition. The acts de-

scribed by petitioner as “misconception” on the part of his counsel, the prosecutor, and the trial judge did not constitute the type of coercion required for coram nobis relief; coram nobis proceedings are not a substitute for proceeding under Ark. R. Crim. P. 37.1; and double jeopardy claims do not fall within any of the four categories of recognized claims for a writ of error coram nobis. *Pelletier v. State*, 2015 Ark. 432, 474 S.W.3d 500 (2015).

Cited: *Ross v. State*, 2017 Ark. App. 234, 518 S.W.3d 758 (2017).

5-27-605. Computer exploitation of a child.

CASE NOTES

Double Jeopardy.

With respect to his convictions for computer exploitation of a child under this section, defendant did not explain how his multiple convictions under the statute resulted in a double-jeopardy violation. De-

fendant presented no specific argument that the Legislature did not intend multiple punishments for the same act. *Rea v. State*, 2015 Ark. 431, 474 S.W.3d 493 (2015).

5-27-609. Possession of sexually explicit digital material.

(a) As used in this section:

(1) “Nudity” means a:

(A) Showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering;

(B) Showing of the female breast with less than fully opaque covering of any portion of the female breast below the top of the nipple; or

(C) Depiction of covered male genitals in a discernibly turgid state; and

(2)(A) “Sexually explicit digital material” means any photograph, digitized impact, or visual depiction of a minor:

(i) In any condition of nudity; or

(ii) Involved in any prohibited sexual act.

(B) The distribution of sexually explicit digital material by a minor may commonly be referred to as “sexting”.

(b) A minor commits the offense of possession of sexually explicit digital material if the minor purposely creates, produces, distributes, presents, transmits, posts, exchanges, disseminates, or possesses through a computer, wireless communication device, or digital media, any sexually explicit digital material.

(c) It is an affirmative defense to the offense of possession of sexually explicit digital material that:

(1) A minor:

(A) Has not solicited the sexually explicit digital material;

(B) Does not subsequently distribute, present, transmit, post, print, disseminate, or exchange the sexually explicit digital material; and

(C) Deletes or destroys the sexually explicit digital material upon receipt; or

(2) A minor:

(A) Creates a photograph, digitized impact, or visual depiction of himself or herself; and

(B) Does not subsequently distribute, present, transmit, post, print, disseminate, or exchange the photograph, digitized impact, or visual depiction of himself or herself.

(d)(1) Possession of sexually explicit digital material is a Class A misdemeanor.

(2) A minor who pleads guilty or nolo contendere to or is found guilty of violating this section for a first offense may be ordered to eight (8) hours of community service.

History. Acts 2013, No. 1086, § 4; 2015, No. 1155, § 7.

Amendments. The 2015 amendment substituted “minor” for “juvenile” throughout the section; deleted former (a)(1) and redesignated the remaining subdivisions accordingly; substituted “sexually explicit digital material” for “vi-

sual depiction” throughout (c)(1); inserted “photograph, digitized impact, or” in (c)(2)(A); in (c)(2)(B), inserted “photograph, digitized impact, or” and added “of himself or herself”; and, in (d)(2), inserted “for a first offense” and deleted “if it is the first offense for the juvenile” following “community service.”

RESEARCH REFERENCES

ALR. Construction and Application of State Laws Relating or Applied to Sexting Involving Juveniles, 18 A.L.R.7th Art. 8 (2018).

CHAPTER 28

ABUSE OF ADULTS

SUBCHAPTER.

1. GENERAL PROVISIONS.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-28-101. Definitions.

5-28-103. Criminal penalties for abuse of an endangered or impaired person.

5-28-101. Definitions.

As used in this chapter:

(1) “Abuse” means:

(A) Any purposeful and unnecessary physical act that inflicts pain on or causes injury to an endangered person or an impaired person;

(B) Any purposeful or demeaning act that a reasonable person would believe subjects an endangered person or an impaired person, regardless of age, ability to comprehend, or disability, to ridicule or psychological injury in a manner likely to provoke fear or alarm;

(C) Any purposeful threat that a reasonable person would find credible and nonfrivolous to inflict pain on or cause injury to an endangered person or an impaired person except in the course of medical treatment or for justifiable cause; or

(D) With regard to any adult long-term care facility resident by a caregiver, any purposeful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish;

(2) "Adult maltreatment" means adult abuse, exploitation, neglect, physical abuse, or sexual abuse;

(3) "Caregiver" means a related or unrelated person, owner, agent, high managerial agent of a public or private organization, or a public or private organization that has the responsibility for the protection, care, or custody of an adult endangered person or an adult impaired person as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court;

(4) "Endangered person" means:

(A) An adult who:

(i) Is found to be in a situation or condition that poses an imminent risk of death or serious bodily harm to the adult; and

(ii) Demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition; or

(B) A long-term care facility resident who:

(i) Is found to be in a situation or condition which poses an imminent risk of death or serious bodily harm to the person; and

(ii) Demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition;

(5) "Exploitation" means:

(A) The illegal or unauthorized use or management of an adult endangered person's or an adult impaired person's funds, assets, or property or the use of an adult endangered person's or an adult impaired person's person, power of attorney, or guardianship for the profit or advantage of the actor or another person; or

(B) Misappropriation of property of an adult long-term care facility resident which means the deliberate misplacement, exploitation, or wrongful, temporary, or permanent use of an adult long-term care facility resident's belongings or money without the adult long-term care facility resident's consent;

(6) "Imminent danger to health or safety" means a situation in which death or severe bodily injury could reasonably be expected to occur without intervention;

(7)(A) "Impaired person" means a person eighteen (18) years of age or older who as a result of mental or physical impairment is unable to protect himself or herself from abuse, sexual abuse, neglect, or

exploitation, and as a consequence of this inability to protect himself or herself is endangered.

(B) For purposes of this chapter, a long-term care facility resident is presumed to be an “impaired person”;

(8) “Long-term care facility” means:

- (A) A nursing home;
- (B) A residential care facility;
- (C) A post-acute head injury retraining and residential facility;
- (D) Any facility that provides long-term medical or personal care;
- (E) An intermediate care facility for individuals with intellectual disabilities; or

(F) An assisted-living facility;

(9) “Long-term care facility resident” means a person, regardless of age, living in a long-term care facility;

(10) “Long-term care facility resident maltreatment” means abuse, exploitation, neglect, physical abuse, or sexual abuse of a long-term care facility resident;

(11) “Neglect” means:

(A) An act or omission by an endangered person or an impaired person, for example, self-neglect; or

(B) A purposeful act or omission by a caregiver responsible for the care and supervision of an adult endangered person or an adult impaired person that constitutes negligently failing to:

(i) Provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an adult endangered person or an adult impaired person;

(ii) Report a health problem or a change in a health problem or a change in the health condition of an adult endangered person or an adult impaired person to the appropriate medical personnel;

(iii) Carry out a prescribed treatment plan; or

(iv) Provide a good or service necessary to avoid physical harm, mental anguish, or mental illness as defined in rules promulgated by the Office of Long-Term Care to an adult long-term care facility resident;

(12) “Physical injury” means the:

(A) Impairment of a physical condition; or

(B) Infliction of substantial pain;

(13) “Serious bodily harm” means:

(A) Physical abuse;

(B) Sexual abuse;

(C) Physical injury; or

(D) Serious physical injury as defined in this chapter;

(14) “Serious physical injury” means physical injury to an endangered person or an impaired person that:

(A) Creates a substantial risk of death; or

(B) Causes:

(i) Protracted disfigurement;

(ii) Protracted impairment of health; or

(iii) Loss or protracted impairment of the function of any bodily member or organ; and

(15) “Sexual abuse” means deviate sexual activity, sexual contact, or sexual intercourse, as those terms are defined in § 5-14-101, with another person who is incapable of consent because he or she is:

(A) Mentally defective, as defined in § 5-14-101;

(B) Mentally incapacitated, as defined in § 5-14-101; or

(C) Physically helpless, as defined in § 5-14-101.

History. Acts 1983, No. 452, § 1; A.S.A. 1947, § 59-1301; Acts 1988 (4th Ex. Sess.), No. 5, § 1; 1988 (4th Ex. Sess.), No. 15, § 1; 1993, No. 1292, § 1; 1995, No. 1338, § 2; 1997, No. 1034, § 1; 1999, No. 753, § 1; 2001, No. 1028, § 1; 2003, No. 1046, § 1; 2003, No. 1118, § 1; 2005, No. 255, § 1; 2005, No. 1810, § 1; 2019, No. 315, § 149.

Amendments. The 2019 amendment substituted “rules” for “regulations” in (11)(B)(iv).

5-28-103. Criminal penalties for abuse of an endangered or impaired person.

(a) It is unlawful for any person or caregiver to abuse, neglect, or exploit any endangered person or impaired person subject to protection under a provision of this chapter.

(b)(1) If the abuse causes serious physical injury or a substantial risk of death, any person or caregiver who purposely abuses an endangered person or an impaired person is guilty of a Class B felony.

(2) If the abuse causes physical injury, any person or caregiver who purposely abuses an adult endangered person or an adult impaired person in violation of a provision of this chapter is guilty of a Class D felony.

(3) Any person or caregiver who abuses an adult endangered person or an adult impaired person is guilty of a Class B misdemeanor.

(c)(1) Any person or caregiver who neglects an adult endangered person or an adult impaired person in violation of a provision of this chapter, causing serious physical injury or substantial risk of death, is guilty of a Class D felony.

(2) Any person or caregiver who neglects an adult endangered person or an adult impaired person in violation of a provision of this chapter, causing physical injury, is guilty of a Class B misdemeanor.

(3) Any person or caregiver who purposely neglects an adult endangered person or an adult impaired person without causing physical injury is guilty of a Class C misdemeanor.

(d) Any person or caregiver who exploits a person in violation of a provision of this chapter when the value of the property, asset, or resource is:

(1) Two thousand five hundred dollars (\$2,500) or more, is guilty of a Class B felony;

(2) Less than two thousand five hundred dollars (\$2,500) but more than two hundred dollars (\$200), is guilty of a Class C felony; and

(3) Two hundred dollars (\$200) or less, is guilty of a Class A misdemeanor.

History. Acts 1983, No. 452, § 3; A.S.A. 1947, § 59-1303; Acts 1993, No. 1292, § 2; 1995, No. 1338, § 2; 2005, No. 1810, § 2; 2005, No. 1994, § 297; 2019, No. 916, § 1.

Amendments. The 2019 amendment redesignated former (d) as (b)(3); added (c)(3); and redesignated former (e) as (d).

SUBTITLE 4. OFFENSES AGAINST PROPERTY

CHAPTER 36

THEFT

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. THEFT OF PUBLIC BENEFITS.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 5-36-101. Definitions.
- 5-36-102. Consolidation of offenses —
Theft by deception presumption at auction of livestock — Amount of theft.
- 5-36-103. Theft of property.
- 5-36-115. Theft of leased, rented, or entrusted personal property

SECTION.

- False report of wealth or credit.
- 5-36-116. Shoplifting presumption — Detention and arrest of person under shoplifting presumption.
- 5-36-123. Theft of scrap metal.

5-36-101. Definitions.

As used in this chapter:

- (1) “Antishoplifting or inventory control device” means a mechanism or other device designed and operated for the purpose of detecting the removal from a store or business establishment or from a protected area within a store or business establishment;
- (2) “Article” means any object, material, device, or substance or copy of an object, material, device, or substance, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, or map;
- (3) “Building material” means lumber, a construction tool, a window, a door, copper tubing or wire, or any other material or good used in the construction or rebuilding of a building or a structure;
- (4) “Copy” means any facsimile, replica, photograph, or other reproduction of an article, and any note, drawing, or sketch made of or from an article;
- (5) “Cost of incidental damage” means the total amount of money damages suffered by an owner of oil and gas equipment as a direct result of the theft of the oil and gas equipment, including without limitation lost income, lost profits, and cost of repair or replacement of property damage;
- (6)(A) “Deception” means:

(i) Creating or reinforcing a false impression, including a false impression of fact, law, value, or intention or other state of mind that the actor does not believe to be true;

(ii) Preventing another person from acquiring information that would affect his or her judgment of a transaction;

(iii) Failing to correct a false impression that the actor knows to be false and that he or she created or reinforced or that he or she knows to be influencing another person to whom the actor stands in a fiduciary or confidential relationship;

(iv) Failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of property that the actor transfers or encumbers in consideration for the property or service obtained, or in order to continue to deprive another person of that other person's property, whether the impediment is or is not valid or is or is not a matter of official record; or

(v) Employing any other scheme to defraud.

(B) As to a person's intention to perform a promise, "deception" shall not be inferred solely from the fact that the person did not subsequently perform the promise.

(C) "Deception" does not include:

(i) Falsity as to a matter having no pecuniary significance; or

(ii) Puffing by a statement unlikely to deceive an ordinary person in the group addressed;

(7) "Deprive" means to:

(A) Withhold property or to cause it to be withheld either permanently or under circumstances such that a major portion of its economic value, use, or benefit is appropriated to the actor or lost to the owner;

(B) Withhold property or to cause it to be withheld with the purpose to restore it only upon the payment of a reward or other compensation; or

(C) Dispose of property or use it or transfer any interest in it under circumstances that make its restoration unlikely;

(8) "Incidental damage" means loss of income, loss of profit, or property damage;

(9) "Motor fuel" means:

(A) Gasoline, diesel fuel, or alcohol;

(B) Any mixture of gasoline, diesel fuel, or alcohol; or

(C) Any other fuel sold for use in an automobile or related vehicle;

(10) "Obtain" means:

(A) In relation to property, to bring about a transfer or purported transfer of property or of an interest in the property, whether to the actor or another person; or

(B) In relation to a service, to secure performance of the service;

(11) "Oil and gas equipment" means machinery, drilling mud, welding equipment, pipes, fittings, generators, pumps, batteries, or other equipment or tools used in connection with the drilling, production, operation, or maintenance of oil or gas wells, or in connection with the storage or transportation of oil or gas;

(12) "Permitted construction site" means the site of construction, alteration, painting, or repair of a building or a structure for which a building permit has been issued by a city of the first class, a city of the second class, an incorporated town, or a county;

(13) "Property" means severed real property or tangible or intangible personal property, including money or any paper or document that represents or embodies anything of value;

(14)(A) "Property of another person" means any property in which any person or government other than the actor has a possessory or proprietary interest.

(B) However, "property of another person" does not include property in the possession of the actor in which another person has only a security interest, even though legal title is in the secured party pursuant to a conditional sales contract or other security agreement;

(15) "Service" includes:

(A) Labor;

(B) Professional service;

(C) Transportation;

(D) Telephone, mail, or other public service;

(E) Gas, electricity, or other public utility service;

(F) Accommodation in a hotel, restaurant, or other public accommodation;

(G) Admission to an exhibition; and

(H) Use of a vehicle or other property;

(16)(A) "Threat" means a menace, however communicated, to:

(i) Cause physical injury to any person or to commit any other criminal offense;

(ii) Cause damage to any property;

(iii) Accuse any person of a crime;

(iv) Expose a secret or publish a fact tending to subject any person, living or deceased, to hatred, contempt, shame, or ridicule;

(v) Impair any person's credit or business repute;

(vi) Take or withhold action as a public servant or cause a public servant to take or withhold action;

(vii) Testify or provide information or withhold testimony or information with respect to a legal claim or defense of another person;

(viii) Bring about or continue a strike, boycott, or other collective action if a property or service is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

(ix) Do any other act which would not in itself substantially benefit the actor or a group he or she purports to represent but which is calculated to harm another person in a substantial manner with respect to his or her health, safety, business, employment, calling, career, financial condition, reputation, or a personal relationship.

(B) "Threat" does not include an expression of intent to accuse, expose, bring suit, or otherwise invoke official action under subdivisions (16)(A)(iii)-(vi) of this section if made to obtain property claimed as restitution or indemnification for harm done in the circumstances

to which accusation, exposure, lawsuit, or other official action relates or as compensation for property or a lawful service;

(17) “Trade secret” means the whole or any portion of any valuable scientific or technical information, design, process, procedure, formula, or improvement that is not accessible to a person other than a person selected by the owner to have access for a limited purpose;

(18) “Utility” means a person or entity providing to the public gas, electricity, water, sewer, telephone, telegraph, radio, radio common carrier, railway, railroad, cable and broadcast television, video, or internet services;

(19) “Utility property” means any component that is reasonably necessary to provide utility services, including without limitation any wire, pole, facility, machinery, tool, equipment, cable, insulator, switch, signal, duct, fiber optic cable, conduit, plant, work, system, backup deep cycle battery or other power supply, substation, transmission or distribution structure, line, street lighting fixture, generating plant, equipment, pipe, main, transformer, underground line, gas compressor, meter, or any other building or structure or part of a building or structure that a utility uses in the production or use of its services;

(20)(A) “Value” means:

(i) The market value of a property or service at the time and place of the offense, or if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense;

(ii) In the case of a written instrument, other than a written instrument having a readily ascertainable market value, the amount due and collectible at maturity less any part that has been satisfied if the written instrument constitutes evidence of a debt, or the greatest amount of economic loss that the owner might reasonably suffer by virtue of the loss of the written instrument if the written instrument is other than evidence of a debt; or

(iii) Any inherent, subjective, or idiosyncratic worth the owner or possessor of property attaches to the property even if the property has no market value or replacement cost.

(B)(i) If the actor gave consideration for or had a legal interest in the property or service, the amount of the consideration or the value of the interest shall be deducted from the value of the property or service to determine value.

(ii) However, in a case of theft by receiving under § 5-36-106, the consideration the actor gave for the property shall not be deducted to determine value; and

(21) “Vehicle” means any craft or device designed for the transportation of a person or property across land or water or through the air.

History. Acts 1975, No. 280, § 2201; A.S.A. 1947, § 41-2201; Acts 1987, No. 934, § 2; 1997, No. 829, § 1; 2001, No. 745, § 1; 2015, No. 1263, § 1; 2019, No. 611, § 1.

Amendments. The 2015 amendment added the definition for “Antishoplifting or inventory control device.”

The 2019 amendment added the definitions for “Building material”, “Cost of in-

cidental damage”, “Incidental damage”, “Oil and gas equipment”, “Permitted construction site”, “Utility”, and “Utility property”.

RESEARCH REFERENCES

ALR. What Is “Intent to Deprive” Sufficient to Establish Liability for Civil, or Statutory, Theft, 35 A.L.R.7th Art. 1 (2018).

CASE NOTES

ANALYSIS

Deception.
Deprive.
Obtain.
Property of Another Person.

Deception.

Evidence was sufficient to support a conviction for theft by deception because defendant entered into a scheme to defraud by inflating a tax refund amount and then diverting the difference to an account she owned; there was substantial evidence that defendant knowingly obtained the property of another by deception. The taxpayer did not agree to have any of her refund deposited into any other account, and defendant was not forthcoming with information about the separate account, despite the taxpayer’s multiple inquiries. *McClellan v. State*, 2014 Ark. App. 725, 452 S.W.3d 116 (2014).

Substantial evidence supported appellant’s theft of property convictions under § 5-36-103(a)(2) where the evidence allowed the jury to infer that he accepted boat deposits from victims, he was well aware of the lack of manpower at his boat manufacturing business and the increasing number of complaints against it, and he had taken on new business without regard for unfilled orders and had used the deposits to keep the business afloat. *Flemister v. State*, 2016 Ark. App. 180, 487 S.W.3d 386 (2016).

Evidence supported the jury’s conclusion that defendant employed a scheme to defraud, for purposes of § 5-36-103, where patients testified that defendant had represented herself as a doctor, despite having no medical training or credentials from any United States institution, she charged patients for tests but did not show them the actual results, and she affirmatively and falsely represented that patient expenses would be reimbursed by

insurance or Medicare. *Gervais v. State*, 2018 Ark. App. 161, 544 S.W.3d 590 (2018).

Deprive.

Evidence was sufficient to support defendant’s convictions for theft of property; although defendant argued that he did not intend to deprive the owner of the property but only temporarily used the van for medical purposes, his argument was misplaced, as the theft statute made no exception for a temporary deprivation, and the jury could have concluded that he intended to permanently deprive the owner of the property, as the owner testified that tools were missing from the vehicle after it was recovered. *Wolfe v. State*, 2018 Ark. App. 338, 549 S.W.3d 926 (2018).

Obtain.

Directed verdict was properly denied as to the charge of Class B felony theft of property because substantial evidence supported that defendant brought about a transfer of a laptop by threat of serious physical injury when he pointed a firearm at the laptop owner’s roommate and then grabbed the laptop. *Hinton v. State*, 2015 Ark. 479, 477 S.W.3d 517 (2015).

Word “obtain” as used in the theft-by-deception statute, § 5-36-103(a)(2), simply does not have the continuation component inherent in the word “retain”. “Obtain” connotes a singular, discrete taking of possession that occurs at a given time, and theft by deception is generally not a continuing offense. *State v. Gray*, 2016 Ark. 411, 505 S.W.3d 160 (2016).

Trial court did not err in denying defendant’s motion for a directed verdict on the charge of committing theft of automobile by threat where the victim’s testimony established that defendant took unauthorized control of her automobile by threatening to cause physical injury to her by hitting her in the face and displacing

her from the driver's seat, he continued to exercise unauthorized control by not allowing the victim to drive and refusing to let her out, and after the victim escaped, defendant continued to drive the automobile until he was pursued by the police, abandoned the vehicle, and fled on foot. *Brown v. State*, 2017 Ark. App. 480, 531 S.W.3d 417 (2017).

Property of Another Person.

Evidence was sufficient to support defendant's aggravated-robbery conviction

under § 5-12-103(a)(3) where although it was illegal for the victim to possess the marijuana, it clearly had value, was subject to possession, and thus, fell within the definition of property and property of another person as set forth in this section. *Gould v. State*, 2014 Ark. App. 543, 444 S.W.3d 408 (2014).

Cited: *Gillean v. State*, 2015 Ark. App. 698, 478 S.W.3d 255 (2015).

5-36-102. Consolidation of offenses — Theft by deception presumption at auction of livestock — Amount of theft.

(a) Conduct denominated theft in this chapter constitutes a single offense embracing the separate offenses known before January 1, 1976, as:

- (1) Larceny;
- (2) Embezzlement;
- (3) False pretense;
- (4) Extortion;
- (5) Blackmail;
- (6) Fraudulent conversion;
- (7) Receiving stolen property; and
- (8) Other similar offenses.

(b) Notwithstanding the specification of a different manner in the indictment or information, a criminal charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter subject only to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief if the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

(c) A person who is subject to 7 U.S.C. § 181 et seq. that obtains livestock from a commission merchant by representing that the person will make prompt payment is presumed to have obtained the livestock by deception if the person fails to make payment in accordance with 7 U.S.C. § 228b.

(d)(1) The amount involved in a theft is deemed to be the highest value, by any reasonable standard, of the property or service that the actor obtained or attempted to obtain.

(2) An amount involved in a theft committed pursuant to one (1) scheme or course of conduct, whether from one (1) or more persons, may be aggregated in determining the grade of the offense.

History. Acts 1975, No. 280, § 2202; A.S.A. 1947, § 41-2202; Acts 2009, No. 1401, § 1; 2015, No. 1263, § 2.

Amendments. The 2015 amendment

deleted “— Shoplifting presumption” following “offenses” in the section heading; deleted former (c), and redesignated the remaining subsections accordingly.

CASE NOTES

Distinction Between Theft Types.

Distinction between types of theft has been abolished under Arkansas law; the statute explicitly states that theft of property embraces the separate offenses previously known as larceny, embezzlement,

false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and other similar offenses. *Henson v. State*, 2014 Ark. App. 703, 450 S.W.3d 677 (2014).

5-36-103. Theft of property.

(a) A person commits theft of property if he or she knowingly:

(1) Takes or exercises unauthorized control over or makes an unauthorized transfer of an interest in the property of another person with the purpose of depriving the owner of the property; or

(2) Obtains the property of another person by deception or by threat with the purpose of depriving the owner of the property.

(b) Theft of property is a:

(1) Class B felony if:

(A) The value of the property is twenty-five thousand dollars (\$25,000) or more;

(B) The property is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person;

(C) The property is obtained by threat and the actor stands in a confidential or fiduciary relationship to the person threatened; or

(D) The property is:

(i) Anhydrous ammonia in any form;

(ii) A product containing any percentage of anhydrous ammonia in any form;

(iii) Utility property and the value of the property is five hundred dollars (\$500) or more; or

(iv) Oil and gas equipment, the value of the property is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000), and the person:

(a) Caused more than two hundred fifty dollars (\$250) in incidental damage to the owner of the oil and gas equipment during the commission of the offense; or

(b) Transported the oil and gas equipment across state lines to sell or dispose of the oil and gas equipment;

(2) Class C felony if:

(A) The value of the property is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000);

(B) The property is obtained by threat;

(C) The property is a firearm valued at two thousand five hundred dollars (\$2,500) or more;

(D) The property is building material obtained from a permitted construction site and the value of the building material is five hundred dollars (\$500) or more;

(E) The value of the property is five hundred dollars (\$500) or more and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county; or

(F) The property is oil and gas equipment, the value of the property is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000), and the person:

(i) Caused more than two hundred fifty dollars (\$250) in incidental damage to the owner of the oil and gas equipment during the commission of the offense; or

(ii) Transported the oil and gas equipment across state lines to sell or dispose of the oil and gas equipment;

(3) Class D felony if:

(A) The value of the property is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000);

(B) The property is a firearm valued at less than two thousand five hundred dollars (\$2,500);

(C) The property is a:

(i) Credit card or credit card account number; or

(ii) Debit card or debit card account number;

(D) The value of the property is at least one hundred dollars (\$100) or more but less than five hundred dollars (\$500) and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county;

(E) The property is livestock and the value of the livestock is in excess of two hundred dollars (\$200);

(F) The property is an electric power line, gas line, water line, wire or fiber insulator, electric motor, or other similar apparatus connected to a farm shop, on-farm grain drying and storage complex, heating and cooling system, environmental control system, animal production facility, irrigation system, or dwelling;

(G) The property is a decorative or memorial item from a cemetery, graveyard, or a person's grave site and the offense is the actor's second or subsequent offense of theft of a decorative or memorial item from a cemetery, graveyard, or a person's grave site under this section; or

(H) The property is oil and gas equipment, the value of the property is one thousand dollars (\$1,000) or less, and the person:

(i) Caused more than two hundred fifty dollars (\$250) in incidental damage to the owner of the oil and gas equipment during the commission of the offense; or

(ii) Transported the oil and gas equipment across state lines to sell or dispose of the oil and gas equipment; or

(4) Class A misdemeanor if:

(A) The value of the property is one thousand dollars (\$1,000) or less;

(B) The property has inherent, subjective, or idiosyncratic value to its owner or possessor even if the property has no market value or replacement cost; or

(C) The property is a decorative or memorial item from a cemetery, graveyard, or a person's grave site.

(c)(1) Upon the proclamation of a state of emergency by the President of the United States or the Governor or upon the declaration of a local emergency by the executive officer of any city or county and for a period of thirty (30) days following that declaration, the penalty for theft of property is enhanced if the property is:

(A) A generator intended for use by:

(i) A public facility;

(ii) A nursing home or hospital;

(iii) An airport;

(iv) A public safety device;

(v) A communication tower or facility;

(vi) A public utility;

(vii) A water system or sewer system;

(viii) A public safety agency; or

(ix) Any other facility or use providing a vital service; or

(B) Any other equipment used in the transmission of electric power or telephone service.

(2) As used in this subsection:

(A) "Public safety agency" means an agency of the State of Arkansas or a functional division of a political subdivision that provides:

(i) Firefighting and rescue;

(ii) Natural or human-caused disaster or major emergency response;

(iii) Law enforcement; or

(iv) Ambulance or emergency medical services; and

(B) "Public safety device" includes, but is not limited to, a traffic signaling device or a railroad crossing device.

(3) The penalty is enhanced as follows:

(A)(i) The fine for the offense shall be at least five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000).

(ii) The fine is mandatory; and

(B) The offense is a Class D felony if it would have been a Class A misdemeanor.

History. Acts 1975, No. 280, § 2203; 1977, No. 360, § 8; 1979, No. 592, § 1; 1983, No. 719, § 1; A.S.A. 1947, § 41-2203; Acts 1987, No. 934, § 3; 1991, No. 712, § 1; 1995, No. 277, § 1; 1997, No. 516, § 1; 2001, No. 157, § 1; 2001, No. 1195, § 1; 2003, No. 838, § 1; 2005, No. 1442, § 1; 2007, No. 693, § 1; 2007, No. 827, § 39; 2009, No. 1295, § 2; 2011, No. 570, § 23; 2011, No. 1120, § 8; 2011, No. 1227, § 1; 2013, No. 1125, § 7; 2019, No. 311, § 1; 2019, No. 503, § 1; 2019, No. 611, § 2.

Publisher's Notes. Acts 2019, No. 611, § 2 specifically amended this section as amended by Acts 2019, No. 311, § 1.

Amendments. The 2019 amendment by No. 311 inserted "backup deep cycle

battery or other power supply” in former (b)(1)(E)(ii)(b) (now see definition of “Utility property” in § 5-36-101).

The 2019 amendment by No. 503 added (b)(3)(G) and (b)(4)(C).

The 2019 amendment by No. 611 redesignated (b)(1)(E)(i) as (b)(1)(D)(iii); substi-

tuted “Utility” for “The property is utility” in (b)(1)(D)(iii); added (b)(1)(D)(iv); deleted (b)(1)(E)(ii); deleted the (b)(2)(D)(i) designation; deleted (b)(2)(D)(ii); and added (b)(2)(F) and (b)(3)(G) [now (b)(3)(H)].

RESEARCH REFERENCES

ALR. What Is “Intent to Deprive” Sufficient to Establish Liability for Civil, or Statutory, Theft, 35 A.L.R.7th Art. 1 (2018).

Ark. L. Rev. Mason L. Boling, Legisla-

tive Note: That Was the Easy Part: The Development of Arkansas’s Public Safety Improvement Act of 2011, and Why the Biggest Obstacle to Prison Reform Remains Intact, 66 Ark. L. Rev. 1109 (2013).

CASE NOTES

ANALYSIS

Deception.

Elements.

Evidence.

—Obtain by Threat.

—Sufficiency.

—Threat of Serious Physical Injury.

Intent.

Jury.

Lesser Included Offenses.

Statute of Limitations.

Unauthorized Taking.

Value.

Deception.

Substantial evidence supported appellant’s theft of property convictions under subdivision (a)(2) of this section where the evidence allowed the jury to infer that he accepted boat deposits from victims, he was well aware of the lack of manpower at his boat manufacturing business and the increasing number of complaints against it, and he had taken on new business without regard for unfilled orders and had used the deposits to keep the business afloat. *Flemister v. State*, 2016 Ark. App. 180, 487 S.W.3d 386 (2016).

Elements.

Probation was properly revoked because a trial court’s finding that probationer stole and pawned a window-unit air conditioner, violating the terms of the probationer’s suspended sentence, was not clearly against the preponderance of the evidence; the probationer admitted to stealing the air conditioner from the window of a homeowner who hired the proba-

tioner to mow the homeowner’s yard. *Collins v. State*, 2015 Ark. App. 600, 474 S.W.3d 531 (2015).

Evidence.

Evidence was insufficient to compel a conclusion one way or another without speculation or conjecture, and thus the court reversed defendant juvenile’s delinquency adjudication for the offense of accomplice to theft of property. *F.C. v. State*, 2014 Ark. App. 196 (2014).

Evidence supported the jury’s conclusion that defendant employed a scheme to defraud, for purposes of this section, where patients testified that defendant had represented herself as a doctor, despite having no medical training or credentials from any United States institution, she charged patients for tests but did not show them the actual results, and she affirmatively and falsely represented that patient expenses would be reimbursed by insurance or Medicare. *Gervais v. State*, 2018 Ark. App. 161, 544 S.W.3d 590 (2018).

Substantial evidence supported defendant’s theft of property conviction because the circuit court was not required to believe the self-serving evidence from defendant that he never possessed the undelivered boat since he was the person most interested in the outcome of the proceeding. *Hamrick v. State*, 2019 Ark. App. 298, 577 S.W.3d 734 (2019).

—Obtain by Threat.

Trial court did not err in denying defendant’s motion for a directed verdict on the charge of committing theft of automobile

by threat where the victim's testimony established that defendant took unauthorized control of her automobile by threatening to cause physical injury to her by hitting her in the face and displacing her from the driver's seat, he continued to exercise unauthorized control by not allowing the victim to drive and refusing to let her out, and after the victim escaped, defendant continued to drive the automobile until he was pursued by the police, abandoned the vehicle, and fled on foot. *Brown v. State*, 2017 Ark. App. 480, 531 S.W.3d 417 (2017).

Trial court did not err in denying defendant's directed-verdict motion as substantial evidence supported defendant's conviction for theft of property because the jury could have reasonably concluded that defendant threatened the victim when he pointed the shotgun at him; and this section does not require that the threat be verbalized or that the victim have any particular mental state. *Fletcher v. State*, 2018 Ark. App. 113, 543 S.W.3d 547 (2018).

—Sufficiency.

Evidence was sufficient to find defendant guilty of aggravated robbery and theft of property because, while the store's employees identified another person in the first photographic spread, they both identified him in a second spread and in court, the jury had before it witness testimony, a videotape, and photographs showing that defendant brought a backpack into the store, left it there, he possessed and used a gun, and his DNA was on a mouthwash bottle found in the backpack. *Turner v. State*, 2014 Ark. 415, 443 S.W.3d 535 (2014).

Evidence was sufficient to convict defendant of eight counts of theft for stealing horses, a horse trailer, and tack from a university and to deny her motion for directed verdict because several witnesses testified that defendant planned the thefts, gave a map of the stables to her boyfriend and his friend, provided the use of her truck for the thefts, assisted her boyfriend and his friend in hiding the trailer at her aunt and uncle's home, directed her boyfriend to kill one horse and hide the remaining four horses, and secured a place for her boyfriend and his friend to hide at her daughter's house. *Cox v. State*, 2014 Ark. App. 321 (2014).

Evidence was sufficient to convict defendant of theft as an accomplice because defendant asked the complainant to give the back-seat passenger a ride; the back-seat passenger took the complainant's wallet and the \$3700 it contained while defendant struggled with the complainant to take her cell phone; it was up to the circuit court to decide whether defendant and the back-seat passenger acted in concert to divert the complainant's attention and steal her money; defendant's account of events differed so significantly from the testimony of other witnesses that the trial court, as the trier of fact, could readily discount her entire testimony; and her attempt to flee from the crime scene was relevant to the issue of guilt. *Cosey v. State*, 2014 Ark. App. 441, 439 S.W.3d 731 (2014).

Defendant juvenile attempted to aid her boyfriend by shielding his actions and then looking around, she knew he was going to steal, and her actions aided the commission of the theft; the court affirmed defendant's delinquency adjudication for being an accomplice to theft of property based on the sufficient evidence. *H.V. v. State*, 2014 Ark. App. 607, 447 S.W.3d 619 (2014).

Substantial evidence supported defendant's theft of property conviction, as she was the only employee who made bank deposits and who reported deposits in transit used to conceal the theft, plus there was no other explanation for how she was able to afford certain things on her income or for the significant cash deposits made to her accounts, which stopped after she was terminated; although the evidence was mostly circumstantial, it was more than sufficient to sustain defendant's conviction, as she had access to the cash, she concealed the missing money during audits, and she benefited from the crime. *Henson v. State*, 2014 Ark. App. 703, 450 S.W.3d 677 (2014).

Evidence was sufficient to support a conviction for theft by deception because defendant entered into a scheme to defraud by inflating a tax refund amount and then diverting the difference to an account she owned; there was substantial evidence that defendant knowingly obtained the property of another by deception. The taxpayer did not agree to have any of her refund deposited into any other account, and defendant was not forthcom-

ing with information about the separate account, despite the taxpayer's multiple inquiries. *McClellan v. State*, 2014 Ark. App. 725, 452 S.W.3d 116 (2014).

Fact-finder could reasonably conclude, without resorting to speculation or conjecture, that defendant exercised unauthorized control over oil pipes and committed the offense of theft of property in violation of this section. *Jackson v. State*, 2015 Ark. App. 164 (2015).

Evidence clearly pointed to defendant's unauthorized possession of the victim's property; defendant sold the recently stolen property in a pawn shop, and the unexplained, unsatisfactory, or improbable explanation for possession of recently stolen property may be considered as evidence of guilt of theft of property. *Brickey v. State*, 2015 Ark. App. 175 (2015).

Evidence was sufficient for aggravated robbery, first-degree battery, and theft of property under \$1,000 convictions since defendant's arguments all presented questions of fact and involved the credibility and weight of the evidence, which were matters for the jury to decide; the jury heard all of the evidence, and defense counsel was permitted to cross-examine the witnesses to point out the very weaknesses that defendant complained of on appeal. As to Facebook conversations, the appellate court was able to consider both properly and improperly admitted evidence on a sufficiency of the evidence review. *Means v. State*, 2015 Ark. App. 643, 476 S.W.3d 168 (2015).

Evidence was sufficient to support defendant's convictions for aggravated robbery and theft of property because the State introduced crucial evidence through a witness that defendant confessed to committing the robbery and to using a .40-caliber pistol to do so; in addition to that direct evidence, the State introduced ample circumstantial evidence that tied defendant to the crime. *Chatmon v. State*, 2015 Ark. 28, 467 S.W.3d 731 (2015).

Evidence was sufficient in relation to a carjacking to convict defendant of aggravated robbery and theft, and to enhance the sentence due to the use of a firearm during the robbery, because the victim testified that defendant approached the victim as she was about to get in her car and told her to move out of the way; when she did not immediately move away, defendant lifted his shirt, displaying the

handle of a gun protruding from his pants; the victim thought defendant was going to pull out the gun, so she stepped back, and he entered her car and drove it away; the victim picked out defendant almost immediately from a photographic lineup; and the victim's unequivocal testimony identified defendant as the culprit. *Davis v. State*, 2016 Ark. App. 274, 493 S.W.3d 339 (2016).

Evidence was sufficient to sustain defendant's robbery conviction where an undercover security guard testified that defendant placed a bottle of laundry detergent inside her flat purse, the purse bulged, defendant did not pay for the detergent before walking out of the store, she shoved the guard when he confronted her in the parking lot, and she fled the scene abruptly when confronted by loss-prevention officers. *Horton v. State*, 2017 Ark. App. 481, 530 S.W.3d 880 (2017).

Trial court properly denied defendant's motion for a directed verdict where a detective's testimony and cell-phone location data placed defendant's phone in the vicinity of the equipment company at the time of the theft, video surveillance showed that a white SUV was used in the theft of the lawn mower and that defendant owned a similar vehicle, and defendant had subsequently attempted to sell the mower. *Mosley v. State*, 2017 Ark. App. 487, 529 S.W.3d 657 (2017).

Evidence was sufficient to convict defendant of misdemeanor theft of property as defendant admitted taking a stereo system, a chess set, and a CD cleaner kit; and there was no minimum value requirement for misdemeanor theft of property. *Jeffries v. State*, 2017 Ark. App. 62, 510 S.W.3d 267 (2017).

Defendant's theft-of-property conviction was affirmed where the victim's testimony that her home had been broken into, jewelry was missing, and she was emotionally affected as a result made clear that defendant and his accomplices were not authorized to take or exercise control over the victim's property. *Hubbard v. State*, 2017 Ark. App. 93, 513 S.W.3d 289 (2017).

Evidence was sufficient to sustain defendant's conviction for theft of property, where the witness testimony established that the agricultural pivot was in the possession, control, and use of a farm when the copper wires were stolen. *Savage v. State*, 2017 Ark. App. 261 (2017).

Trial court did not err in denying defendant's directed verdict motions, as evidence that defendant was seen leaving the victim's residence and was found 30 minutes later in possession of recently stolen property taken from the residence was sufficient to support defendant's convictions for residential burglary and theft of property. *Owens v. State*, 2017 Ark. App. 353 (2017).

Evidence supported defendant's convictions for residential burglary and theft of property because the victim testified that defendant, whom the victim had never seen before, was walking down the driveway away from the victim's house when the victim returned after a short errand and that the victim discovered items were taken from the house. Defendant also gave a police detective an inconsistent explanation as to why defendant was in the victim's neighborhood and attempted to flee when officers arrived at the house where defendant was located (no-merit brief). *Sanford v. State*, 2019 Ark. App. 10, 567 S.W.3d 553 (2019).

—Threat of Serious Physical Injury.

Directed verdict was properly denied as to the charge of Class B felony theft of property because substantial evidence supported that defendant brought about a transfer of a laptop by threat of serious physical injury when he pointed a firearm at the laptop owner's roommate and then grabbed the laptop. *Hinton v. State*, 2015 Ark. 479, 477 S.W.3d 517 (2015).

Intent.

Evidence was sufficient to support defendant's convictions for theft of property; although defendant argued that he did not intend to deprive the owner of the property but only temporarily used the van for medical purposes, his argument was misplaced, as the theft statute made no exception for a temporary deprivation, and the jury could have concluded that he intended to permanently deprive the owner of the property, as the owner testified that tools were missing from the vehicle after it was recovered. *Wolfe v. State*, 2018 Ark. App. 338, 549 S.W.3d 926 (2018).

Jury.

Defendant's claim regarding the verdict form was rejected where he had not raised the issue below, the erroneous statement

of theft by receiving was a clerical error, and the circumstances showed that defendant was convicted of, and sentenced for, the crime of theft of property. *Savage v. State*, 2017 Ark. App. 261 (2017).

Lesser Included Offenses.

In a theft trial, it was not necessary to instruct the jury on the lesser-included offense of attempted theft because defendant clearly exercised unauthorized control over a store's property when he threw it over a fence into an area off the store's parking lot; it was not necessary that defendant also "take" the property to complete the crime. *Cole v. State*, 2013 Ark. App. 492 (2013).

Statute of Limitations.

Theft by deception is generally not a continuing offense. *State v. Gray*, 2016 Ark. 411, 505 S.W.3d 160 (2016).

"Obtains" in subdivision (a)(2) of this section connotes a singular, discrete taking of possession that occurs at a given time. *State v. Gray*, 2016 Ark. 411, 505 S.W.3d 160 (2016).

Circuit court did not err in dismissing the charge of theft of property by deception under subdivision (a)(2) of this section as barred by the statute of limitations because, contrary to the State's contention, the offense did not constitute a continuing offense. Defendant knowingly obtained the victim's property by deception, with the purpose of depriving the victim of the property, when the victim made wire transfers into an account controlled by defendant. Therefore, the statute of limitations began to run with the transfers and the limitations period expired before the prosecution commenced. *State v. Gray*, 2016 Ark. 411, 505 S.W.3d 160 (2016).

Where the State contended that even if theft by deception is not a continuing offense, the statute of limitations was extended due to fraud, that theory of the State's appeal was not properly before the appellate court under Ark. R. App. P. Crim. 3 because the State's argument on that point turned on facts unique to the case. *State v. Gray*, 2016 Ark. 411, 505 S.W.3d 160 (2016).

Unauthorized Taking.

There was sufficient evidence to support malicious prosecution claims brought by two employees who were accused of theft, prosecuted, and fired from their jobs, be-

cause substantial evidence existed that the employer did not make a full, fair, and truthful disclosure to the prosecuting attorney concerning evidence that the employees had permission from their supervisor to sell trailers. If the employees had permission to make the sales, they were not guilty of making unauthorized transfers of the employer's property under this section. *Family Dollar Trucking, Inc. v. Huff*, 2015 Ark. App. 574, 474 S.W.3d 100 (2015).

Value.

In a case involving stolen university exams, the trial court did not err in finding that the requirements of the commercial burglary statute, § 5-39-201(b), were met because misdemeanor theft is punishable by one year imprisonment; no minimum value was required to be shown, and the testimony supported the State's assertion that the exams had inherent value to the students, to the professors themselves, and to the university as an academic institution. *Gillean v. State*, 2015 Ark. App. 698, 478 S.W.3d 255 (2015).

Defendant's appeal of a conviction for theft of property was frivolous as, *inter alia*, defendant acknowledged that there had been some evidence of the value of stolen items. *Guthrie v. State*, 2017 Ark. App. 681 (2017).

Evidence supported defendant's Class B felony conviction under subdivision

(b)(1)(A) of this section where credit card statements from a patient's father established the amounts paid for alleged "treatments" for his daughter at defendant's purported naturopathic medical clinic. *Gervais v. State*, 2018 Ark. App. 161, 544 S.W.3d 590 (2018).

Evidence supported defendant's Class C felony conviction under subdivision (b)(2)(A) of this section where the victim testified that she wrote defendant a check for \$9,100, defendant gave her a check in return for \$9,100 purportedly until the victim's insurance money came, and the victim was never able to cash defendant's check and was thus clearly deprived of \$9,100. *Gervais v. State*, 2018 Ark. App. 161, 544 S.W.3d 590 (2018).

Evidence supported defendant's Class A misdemeanor conviction under subdivision (b)(4)(A) of this section where the victim specifically testified at least three times that he knew he paid defendant upward of \$1,500, an amount that included the alleged DNA report from Germany, which cost \$600. *Gervais v. State*, 2018 Ark. App. 161, 544 S.W.3d 590 (2018).

Cited: (decision under prior law); *Cartwright v. State*, 2016 Ark. App. 425, 501 S.W.3d 849 (2016); *Whitworth v. State*, 2017 Ark. App. 462, 531 S.W.3d 407 (2017).

5-36-104. Theft of services.

RESEARCH REFERENCES

ALR. What Is "Intent to Deprive" Sufficient to Establish Liability for Civil, or Statutory, Theft, 35 A.L.R.7th Art. 1 (2018).

5-36-105. Theft of property lost, mislaid, or delivered by mistake.

RESEARCH REFERENCES

Ark. L. Notes. John Norwood, The Splendid Mystery of the Lost Lottery Ticket, 2013 Ark. L. Notes 1217.

5-36-106. Theft by receiving.**CASE NOTES****ANALYSIS**

Evidence.

Knowledge and Intent.

Possession.

Value.

Evidence.

Adjudication of delinquency on charges of theft by receiving was improper because the evidence was insufficient without resorting to prohibited suspicion and conjecture; after excluding an accomplice's testimony, being a passenger in a stolen vehicle was not enough to establish constructive possession. The only evidence corroborating the accomplice testimony was that of his sister, who testified that she knew appellant and the other passengers in the stolen car and that all of them, appellant included, had seen her vehicle before. *D.F. v. State*, 2015 Ark. App. 656, 476 S.W.3d 189 (2015).

Substantial evidence supported defendant's conviction under this section where the State offered testimony that the truck was hidden in defendant's shed and was missing parts, the license plate was not on it, a piece of plastic concealed the VIN number, and defendant did not know how his friend acquired the vehicle, and thus, defendant knew or had good reason to believe that the truck was stolen. *Crozier v. State*, 2016 Ark. App. 307, 496 S.W.3d 401 (2016).

There was sufficient evidence to support the jury's decision that defendant committed theft by receiving; the owner identified the firearm as belonging to him, and while the serial-number evidence was off by one number, this discrepancy was an issue to be weighed by the jury. Furthermore, while defendant claimed he had obtained the firearm from his friend as a gift and did not know it was stolen, the jury was not required to believe his testimony. *Blair v. State*, 2018 Ark. App. 509, 562 S.W.3d 261 (2018).

Sufficient evidence supported defendant's conviction for theft by receiving

given testimony that a stolen firearm was discovered under the passenger-side dashboard of a car in which defendant was riding in the passenger seat and defendant's admission that he purchased the firearm from an acquaintance (no-merit brief). *Kelley v. State*, 2019 Ark. App. 71, 568 S.W.3d 801 (2019).

Knowledge and Intent.

Trial court did not err in denying defendant's motion for directed verdict where the testimony showed that he was found with a gun that had been stolen three months before his arrest, he concealed it in an armrest in the back of a pickup truck, and attempts had been made to alter the gun's appearance; as a result, the presumption in subdivision (c)(1) of this section applied. *Miller v. State*, 2018 Ark. App. 478, 561 S.W.3d 345 (2018).

Possession.

Evidence was sufficient to support defendant's convictions of felony theft by receiving, possession of methamphetamine, and possession of drug paraphernalia, as defendant was in constructive possession of the contraband found at the residence; although another individual also was in the residence at the time of the search, defendant had listed the residence as his address, the contraband was found in plain view in common areas in and around the house, and the fact that defendant was in a bedroom hiding under a bed when the search commenced did not negate the additional factors linking him to the contraband. *Mudd v. State*, 2018 Ark. App. 628, 565 S.W.3d 154 (2018).

Value.

Defendant argued that the State was required to put on affirmative proof of the value of the allegedly stolen property, but theft by receiving of a firearm is at least a Class D felony regardless of the weapon's value, and the State is not required to establish the value of the firearm in order to obtain a conviction. *Blair v. State*, 2018 Ark. App. 509, 562 S.W.3d 261 (2018).

5-36-115. Theft of leased, rented, or entrusted personal property — False report of wealth or credit.

(a) A person is guilty of theft of leased, rented, or entrusted property if the person:

(1) Purposely, with a purpose to defraud, or by false pretense takes, carries, leads, drives away, destroys, sells, secretes, converts, or appropriates in any wrongful manner any personal property of another person that is leased, rented, or entrusted to the actor; or

(2) Falsely reports of his or her wealth or mercantile credit and by the false report fraudulently obtains possession of personal property or the labor or service of another person.

(b) The amount involved in the theft of leased, rented, or entrusted property is deemed to be the highest value by any reasonable standard of the personal property, service, or labor.

(c) It is prima facie evidence of purpose to commit theft of leased or rented property if a person who has leased or rented the personal property of another person:

(1) Fails to return or make an arrangement acceptable with the lessor to return the personal property to the owner within five (5) days, excluding Saturday, Sunday, or a state or federal holiday, after proper notice following the expiration of the lease or rental agreement; or

(2) Presents identification to the lessor or renter of the personal property that is false, fictitious, or not current with respect to name, address, place of employment, or other appropriate item.

(d) Proper notice by the lessor or renter of the personal property shall consist of a written demand addressed and mailed by certified or registered mail to the lessee or rentee at the address given at the time of making the lease or rental agreement.

(e) The following factors constitute an affirmative defense to prosecution for theft of leased or rented property:

(1) That the lessee or rentee accurately stated his or her name and address at the time of lease or rental;

(2) That the lessee's or rentee's failure to return the personal property at the expiration date of the lease or rental agreement was lawful;

(3) That the lessee or rentee failed to receive the lessor's or renter's notice personally unless notice was waived; and

(4) That the lessee or rentee returned the personal property to the lessor, renter, or owner within forty-eight (48) hours of the commencement of prosecution, together with any charges for the overdue period and the value of damages to the personal property, if any.

(f)(1) For any lease or rental contract of twenty-five dollars (\$25.00) or more, the lessee may waive the notice required in subsection (c) of this section by signing a statement contained in the lease agreement or rental agreement. The waiver shall require a separate signature of the lessee.

(2) The form of the waiver shall be substantially as follows:

“WAIVER OF NOTICE

I acknowledge that I shall be subject to criminal penalties for theft under § 5-36-115 for: (a) failure to return or make arrangements acceptable to the lessor to return the property covered by this contract within five (5) days, excluding Saturday, Sunday, or state or federal holidays; or (b) presenting identification to the lessor or renter which is false, fictitious, or not current with respect to name, address, place of employment, or other appropriate items. I hereby waive my right to notice by certified or registered mail before such actions constitute prima facie evidence of an intent to commit theft.

Signature

Date”

(g) A violation of this section is a:

(1) Class B felony if:

(A) The value of the property, service, or labor is twenty-five thousand dollars (\$25,000) or more;

(B) The property, service, or labor is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person; or

(C) The property, service, or labor is obtained by threat and the actor stands in a confidential or fiduciary relationship to the person threatened;

(2) Class C felony if:

(A) The value of the property, service, or labor is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000);

(B) The property, service, or labor is obtained by threat;

(C) The property is a firearm valued at two thousand five hundred dollars (\$2,500) or more; or

(D) The value of the property, service, or labor is five hundred dollars (\$500) or more and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county;

(3) Class D felony if:

(A) The value of the property, service, or labor is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000);

(B) The property is a firearm valued at less than two thousand five hundred dollars (\$2,500);

(C) The value of the property, service, or labor is at least one hundred dollars (\$100) or more but less than five hundred dollars (\$500) and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county;

(D) The property is livestock and the value of the livestock is in excess of two hundred dollars (\$200); or

(E) The property is an electric power line, gas line, water line, wire or fiber insulator, electric motor, or other similar apparatus connected to a farm shop, on-farm grain drying and storage complex, heating and cooling system, environmental control system, animal production facility, irrigation system, or dwelling; or

(4) Class A misdemeanor if:

(A) The value of the property, service, or labor is one thousand dollars (\$1,000) or less; or

(B) The property has inherent, subjective, or idiosyncratic value to its owner or possessor even if the property has no market value or replacement cost.

History. Acts 1977, No. 387, § 1; 1985, No. 883, § 1; A.S.A. 1947, § 41-2209; Acts 1989, No. 720, § 1; 2015, No. 1263, §§ 4, 5.

Amendments. The 2015 amendment substituted “theft of leased, rented, or entrusted property” for “theft and subject to a punishment prescribed by § 5-36-103” in the introductory language of (a); substituted “Purposely, with a purpose to defraud” for “Intentionally, fraudulently” in (a)(1); in (b), substituted “theft of leased, rented, or entrusted property” for “theft” and substituted “personal property, service, or labor” for “property or

service that the person stole or attempted to steal”; substituted “purpose to commit theft of leased or rented property” for “intent to commit theft” in the introductory language of (c); in (d), inserted “or renter of the personal property” and “or rentee”; substituted “theft of leased or rented property” for “theft” in the introductory language of (e), inserted references to “rentee” and “renter” throughout (e); inserted “lease or” in (e)(1); in (e)(2), substituted “personal property” for “item” and “lease or rental agreement” for “rental contract”; and added (g).

CASE NOTES

Evidence Sufficient.

Evidence was sufficient to sustain defendant’s conviction for theft of leased, rented, or entrusted personal property, where he failed to return a vehicle to a rental car company on the date it was due, the vehicle was discovered in Arkansas

parked at his residence, he provided a driver’s license that did not reflect his current address, and the company had unsuccessfully attempted to contact him. *Price v. State*, 2016 Ark. App. 102, 483 S.W.3d 312 (2016).

5-36-116. Shoplifting presumption — Detention and arrest of person under shoplifting presumption.

(a)(1) The knowing concealment by a person on his or her own person or on the person of another of an unpurchased tangible personal property offered for sale by a store or business establishment gives rise to a presumption that the person took the tangible personal property with the purpose of depriving the owner of the store or business establishment or another person having an interest in the tangible personal property.

(2)(A) A person engaging in conduct giving rise to the presumption under subdivision (a)(1) of this section may be detained in a reasonable manner and for a reasonable length of time by a law enforcement

officer, owner of the store or business establishment, or employee or agent of the store or business establishment in order to ensure the recovery of the tangible personal property.

(B) The detention by a law enforcement officer, owner of the store or business establishment, or employee or agent of the store or business establishment does not render the law enforcement officer, owner of the store or business establishment, or employee or agent of the store or business establishment criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(b)(1) If sufficient notice has been posted to advise patrons that an antishoplifting or inventory control device is being utilized, the activation of an antishoplifting or inventory control device as a result of a person's exiting a store or business establishment or a protected area within the store or business establishment constitutes reasonable cause for the detention of the person so exiting by a law enforcement officer, the owner of the store or business establishment, or by an agent or employee of the owner.

(2) Any detention under subdivision (b)(1) of this section shall be made only in a reasonable manner and only for a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the antishoplifting or inventory control device or for the recovery of the tangible personal property offered for sale.

(3) A detention under subdivision (b)(1) of this section by a law enforcement officer, owner of the store or business establishment, or employee or agent of the store or business establishment does not render the law enforcement officer, owner of the store or business establishment, or employee or agent of the store or business establishment criminally or civilly liable for false arrest, false imprisonment, or unlawful detention.

(c) A law enforcement officer, owner of the store or business establishment, or employee or agent of the store or business establishment who observed the person engaging in conduct giving rise to the presumption under subdivision (a)(1) of this section shall provide a written statement that serves as probable cause to justify an arrest if a law enforcement officer arrests the person for theft of property, § 5-36-103.

History. Acts 1957, No. 50, § 4; 1971, No. 164, § 1; 1975, No. 458, § 1; 1975, No. 928, § 15; 1983, No. 551, § 1; 1985, No. 404, § 1; A.S.A. 1947, § 41-2251; Acts 2005, No. 1994, § 246; 2015, No. 1263, § 3.

Amendments. The 2015 amendment rewrote the section heading and the section.

CASE NOTES

Detention.

Defendant was observed by a store manager stuffing merchandise down his pants, then leaving the store, and this

gave rise to a reasonable suspicion on which the officer could detain defendant under Ark. R. Crim. P. 3.1, and also gave rise to the statutory shoplifting presump-

tion; the officer testified that he detained defendant until after the store manager completed an affidavit and did not search him until afterwards, and the detention was proper under the statute. *Wells v. State*, 2017 Ark. App. 174, 518 S.W.3d 106 (2017) (decided under former version of statute).

5-36-123. Theft of scrap metal.

(a) As used in this section:

(1) “Building material” means scrap metal used in the construction or rebuilding of a building or a structure;

(2) “Costs of incidental damage” means the total amount of money damages suffered by an owner of scrap metal as a direct result of the theft of the scrap metal, including lost income, lost profits, and costs of repair or replacement of property damage;

(3) “Incidental damage” means loss of income, loss of profit, or property damage;

(4) “Permitted construction site” means the site of construction, alteration, painting, or repair of a building or a structure for which a building permit has been issued by a city of the first class, a city of the second class, an incorporated town, or a county;

(5) “Public safety agency” means an agency of the State of Arkansas or a functional division of a political subdivision that provides:

(A) Firefighting and rescue;

(B) Response to natural or human-caused disaster or a major emergency;

(C) Law enforcement; or

(D) Ambulance or emergency medical services;

(6) “Public safety device” includes, but is not limited to, a traffic-signaling device or a railroad-crossing device;

(7) “Scrap metal” means copper, copper alloy, copper utility wire, any bronze, or any aluminum as described in § 17-44-101 et seq.;

(8) “Utility” means any person or entity providing to the public gas, electricity, water, sewer, telephone, telegraph, radio, radio common carrier, railway, railroad, cable and broadcast television, video, or internet services; and

(9) “Utility property” means any component that is reasonably necessary to provide utility services, including without limitation any wire, pole, facility, machinery, tool, equipment, cable, insulator, switch, signal, duct, fiber optic cable, conduit, plant, work, system, substation, transmission or distribution structure, line, street lighting fixture, generating plant, equipment, pipe, main, transformer, underground line, gas compressor, meter, or any other building or structure or part of a building or structure that a utility uses in the production or use of its services.

(b) A person commits theft of scrap metal if he or she commits, aids, or is an accomplice to a commission of theft of property under § 5-36-103(a) and the property is scrap metal.

(c) Theft of scrap metal is a:

(1) Class B felony if:

(A) The value of the property is twenty-five thousand dollars (\$25,000) or more;

(B) The property is obtained by the threat of serious physical injury to any person or destruction of the occupiable structure of another person;

(C) The property is obtained by threat and the actor stands in a confidential or fiduciary relationship to the person threatened; or

(D) The property is utility property and the value of the property is five hundred dollars (\$500) or more;

(2) Class C felony if:

(A) The value of the property is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000);

(B) The property is obtained by threat;

(C) The property is building material obtained from a permitted construction site and the value of the building material is five hundred dollars (\$500) or more; or

(D) The value of the property is five hundred dollars (\$500) or more and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county;

(3) Class D felony if:

(A) The value of the property is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000);

(B) The value of the property is at least one hundred dollars (\$100) but less than five hundred dollars (\$500) and the theft occurred in an area declared to be under a state of emergency pursuant to proclamation by the President of the United States, the Governor, or the executive officer of a city or county; or

(C) The property is an apparatus connected to a farm shop, on-farm grain drying and storage complex, heating and cooling system, environmental control system, animal production facility, irrigation system, or dwelling; or

(4) Class A misdemeanor if:

(A) The value of the property is one thousand dollars (\$1,000) or less; or

(B) The property has inherent, subjective, or idiosyncratic value to its owner or possessor even if the property has no market value or replacement cost.

(d)(1) The penalty for theft of scrap metal is enhanced if, upon the proclamation of a state of emergency by the President of the United States or the Governor or upon the declaration of a local emergency by the executive officer of any city or county and for a period of thirty (30) days following that declaration, the property is:

(A) A generator intended for use by:

(i) A public facility;

(ii) A nursing home or hospital;

(iii) An airport;

(iv) A public safety device;

- (v) A communication tower or facility;
- (vi) A public utility;
- (vii) A water system or sewer system;
- (viii) A public safety agency; or
- (ix) Any other facility or entity providing a vital service; or

(B) Any other equipment used in the transmission of electric power or telephone service.

(2) The penalty is enhanced as follows:

(A)(i) The fine for the offense shall be at least five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000).

(ii) The fine is mandatory; and

(B) The offense is a Class D felony if it otherwise would have been a Class A misdemeanor.

(e) Upon conviction of a person for theft of scrap metal, the classification and penalty range shall be increased by one (1) classification if:

(1) The person caused incidental damage to the owner of the scrap metal or the property of the owner of the scrap metal while committing the theft of scrap metal and the costs of incidental damage were more than two hundred fifty dollars (\$250); or

(2) The person transported the scrap metal across state lines to sell or dispose of the scrap metal.

History. Acts 2007, No. 630, § 1; 2013, No. 1354, § 2; 2015, No. 1263, § 6.

Amendments. The 2015 amendment rewrote the section.

CASE NOTES

Sufficiency of Evidence.

Trial court properly convicted defendant of theft of scrap metal and first-degree criminal mischief because defendant's girlfriend admitted that she and defendant were depicted in photos taken by a motion-activated camera, and while her testimony did not have to be corroborated as to the misdemeanors pursuant to § 16-89-111(e), circumstantial evidence independently established the crimes and

tended to connect defendant to the commission of those crimes. The photos indicated that defendant and his girlfriend were near the wire prior to its being stolen, a signal maintainer testified that he did not leave unused wire on the ground when replacing the stolen wire, and there was testimony that the theft of the wire stopped after defendant was caught. *Procella v. State*, 2016 Ark. App. 515, 504 S.W.3d 686 (2016).

SUBCHAPTER 2 — THEFT OF PUBLIC BENEFITS

SECTION.

5-36-202. Theft of public benefits.
5-36-203. [Repealed.]

SECTION.

5-36-204. [Repealed.]

5-36-202. Theft of public benefits.

(a) A person commits theft of public benefits if the person:

(1) Obtains or retains a public benefit from the Department of Human Services or any other state agency administering the distribution of a public benefit:

(A) By means of any false statement, misrepresentation, or impersonation; or

(B) Through failure to disclose a material fact used in making a determination as to the person's qualification to receive a public benefit; or

(2) Receives, retains, or disposes of a public benefit knowing or having reason to know that the public benefit was obtained in violation of this subchapter.

(b) Presentation of false or fictitious information or failure to disclose a material fact in the process of obtaining or retaining public benefits is prima facie evidence of purpose to commit theft of public benefits.

(c) Theft of public benefits is a:

(1) Class B felony if the value of the public benefit is two thousand five hundred dollars (\$2,500) or more;

(2) Class C felony if the value of the public benefit is less than two thousand five hundred dollars (\$2,500) but more than five hundred dollars (\$500); or

(3) Class A misdemeanor if the value of the public benefit is five hundred dollars (\$500) or less.

(d) In addition to an extended term of imprisonment provided by § 5-4-501 for a habitual offender, any person who pleads guilty or nolo contendere to or is found guilty of violating this section shall be imprisoned:

(1) For no less than seven (7) days for a second offense occurring within five (5) years of a prior offense;

(2) For no less than ninety (90) days for a third offense occurring within five (5) years of a prior offense; and

(3) For at least one (1) year for a fourth or subsequent offense occurring within five (5) years of a prior offense.

(e) In addition to restitution, any person who pleads guilty or nolo contendere to or is found guilty of violating this section shall be fined no less than:

(1) One hundred fifty dollars (\$150) for the first offense;

(2) Four hundred dollars (\$400) for a second offense occurring within five (5) years of a prior offense; and

(3) Nine hundred dollars (\$900) for a third or subsequent offense occurring within five (5) years of a prior offense.

History. Acts 1993, No. 320, §§ 2, 3; substituted "purpose to commit" for intent to commit" in (b); and added (c) through 2015, No. 1263, § 7.

Amendments. The 2015 amendment (e).

5-36-203. [Repealed.]

Publisher's Notes. This section, concerning penalties for theft of public benefits, was repealed by Acts 2015, No. 1263,

§ 8. The section was derived from Acts 1993, No. 320, § 4; 2005, No. 1994, § 463.

5-36-204. [Repealed.]

Publisher’s Notes. This section, concerning imprisonment and fines for theft of public benefits, was repealed by Acts 2015, No. 1263, § 9. The section was derived from Acts 1993, No. 320, §§ 5, 6.

CHAPTER 37
FORGERY AND FRAUDULENT PRACTICES

SUBCHAPTER.

- 2. OFFENSES GENERALLY.
- 3. ARKANSAS HOT CHECK LAW.
- 4. COMMUNICATION SERVICES AND DEVICES.
- 5. BUSINESS AND COMMERCIAL OFFENSES GENERALLY.

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-37-208. Criminal impersonation.
- 5-37-217. Healthcare fraud.
- 5-37-218. Stolen valor.
- 5-37-219. Unlawful possession of a skimmer.
- 5-37-226. Filing instruments affecting title or interest in real property.

SECTION.

- 5-37-227. Financial identity fraud — Nonfinancial identity fraud — Restitution — Venue.

Effective Dates. Acts 2019, No. 910, § 6346(b): July 1, 2019. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that this act revises the duties of certain state entities; that this act establishes new departments of the state; that these revisions impact the expenses and operations of state government; and that the sections of this act other than the two uncodified sections of this act preceding the emergency clause titled ‘Funding and

classification of cabinet-level department secretaries’ and ‘Transformation and Efficiencies Act transition team’ should become effective at the beginning of the fiscal year to allow for implementation of the new provisions at the beginning of the fiscal year. Therefore, an emergency is declared to exist, and Sections 1 through 6343 of this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2019”.

5-37-201. Forgery.

CASE NOTES

Evidence.

Defendant’s conviction for forgery was supported by evidence that he was not authorized by the owner to use his checks, yet he put one into circulation electronically through the retailer’s auto-check payment system. *Todd v. State*, 2016 Ark. App. 280, 494 S.W.3d 444 (2016).

5-37-207. Fraudulent use of a credit card or debit card.**CASE NOTES****Evidence.**

Trial court properly denied defendant's motions for a directed verdict on the offense of fraudulent use of a credit card because the evidence was sufficient to find that defendant used her boss's credit card with the purpose to defraud and that such use was unauthorized; defendant admitted having financial difficulties at the time and confessed that she used the credit card. *Stone v. State*, 2015 Ark. App. 543, 473 S.W.3d 29 (2015).

There was substantial evidence to sustain conviction for fraudulent use of a credit card where defendant was identi-

fied from a video in a retail store; it was up to the jury to decide the weight and credibility of the evidence showing that defendant was the one making each transaction on the victims' credit cards. *Williams v. State*, 2015 Ark. App. 553, 472 S.W.3d 509 (2015).

Evidence was sufficient to support the conviction for fraudulent use of a credit card where a patient testified that he found a charge on his credit card bill dated more than a month after he had stopped seeing defendant. *Gervais v. State*, 2018 Ark. App. 161, 544 S.W.3d 590 (2018).

5-37-208. Criminal impersonation.

(a)(1) A person commits criminal impersonation in the first degree if, with the purpose to induce a person to submit to pretended official authority for the purpose to injure or defraud the person, the person:

(A) Pretends to be a law enforcement officer by wearing or displaying, without authority, any uniform or badge by which a law enforcement officer is lawfully distinguished; or

(B) Uses a motor vehicle or motorcycle designed, equipped, or marked with an emblem, logo, marking, decal, insignia, or design so as to resemble a motor vehicle or motorcycle belonging to a federal, state, or local law enforcement agency or law enforcement officer.

(2) Criminal impersonation in the first degree is a Class D felony.

(b)(1) A person commits criminal impersonation in the second degree if the person does an act in his or her pretended or assumed capacity or character with the purpose to injure, defraud, harass, or intimidate another person and the actor:

(A) Assumes a false identity;

(B) Pretends to be a representative of a person or organization;

(C) Pretends to be an officer or employee of the government other than a law enforcement officer described in subsection (a) of this section;

(D) Pretends that he or she is a law enforcement officer when the person is not a law enforcement officer;

(E) Pretends to have a handicap or disability; or

(F) Pretends that he or she is a member of the United States Armed Forces or National Guard.

(2) Criminal impersonation in the second degree is a:

(A) Class D felony if:

(i) The victim of the offense is an animal owner; and

(ii) An animal of the owner is seized as a result of the offense; or

(B) Class A misdemeanor if otherwise committed.

(c) As used in this section:

- (1) “Animal” means the same as defined in § 5-62-102; and
- (2) “Owner” means the same as defined in § 5-62-102.

(d) A circuit court or district court in which a charge is filed under subsection (a) of this section may immediately order the removal of any emblems, logos, markings, decals, insignia, or designs that are the subject of a criminal charge under this section.

History. Acts 1975, No. 280, § 2310; A.S.A. 1947, § 41-2310; Acts 1991, No. 786, § 3; 1997, No. 1014, § 1; 2013, No. 433, § 1; 2013, No. 1178, § 1; 2015, No. 234, § 1; 2017, No. 74, § 1.

in (a)(1)(B), inserted “with an emblem, logo, marking, decal, insignia, or design” and added “or law enforcement officer” to the end; and added (d).

The 2017 amendment added (b)(1)(F).

Amendments. The 2015 amendment,

5-37-217. Healthcare fraud.

(a) As used in this section, “healthcare plan” means a publicly or privately funded program or organization that is formed to provide or pay for healthcare goods or services, including without limitation:

- (1) Health insurance plans;
- (2) Managed care organization plans;
- (3) Risk-based provider plans;
- (4) The Arkansas Medicaid Program;
- (5) The Social Security Disability Insurance program; and
- (6) The Medicare program.

(b) A person commits healthcare fraud if, with a purpose to defraud a healthcare plan, the person provides materially false information or omits material information in support of:

- (1) An application for membership or eligibility for a healthcare plan;
- (2) A claim for payment or reimbursement as a member or provider in a healthcare plan; or
- (3) A prior claim for payment or to justify payments previously received from a healthcare plan for healthcare goods or services during the course of an audit or investigation conducted by the Office of Medicaid Inspector General or a healthcare oversight agency with jurisdiction to audit, investigate, or prosecute any form of healthcare fraud.

(c) Healthcare fraud is a:

- (1) Class A misdemeanor if the aggregate amount of the healthcare fraud in any period of twelve (12) months is less than two thousand five hundred dollars (\$2,500);
- (2) Class C felony if the aggregate amount of the healthcare fraud in any period of twelve (12) months is two thousand five hundred dollars (\$2,500) or more but less than five thousand dollars (\$5,000);
- (3) Class B felony if the aggregate amount of the healthcare fraud in any period of twelve (12) months is five thousand dollars (\$5,000) or more but less than twenty-five thousand dollars (\$25,000); and

(4) Class A felony if the aggregate amount of the healthcare fraud in any period of twelve (12) months is twenty-five thousand dollars (\$25,000) or more.

History. Acts 2013, No. 1499, § 1; 2017, No. 978, § 1.

Amendments. The 2017 amendment rewrote the section.

5-37-218. Stolen valor.

(a) As used in this section, “United States Armed Forces” means:

(1) Any branch or reserve component of the United States Armed Forces; and

(2) The National Guard of any state.

(b) A person commits the offense of stolen valor if, with the purpose to obtain property, a service, or a benefit, he or she knowingly misrepresents himself or herself:

(1) By the use of false military identification, including without limitation a:

(A) United States Department of Defense identification card;

(B) Military veteran’s Certificate of Release or Discharge from Active Duty, generally referred to as a “DD Form 214”; or

(C) United States Department of Veterans Affairs identification card;

(2) To be an active member or veteran of the United States Armed Forces;

(3) To be a recipient of a military decoration, medal, or badge;

(4) To be a holder of an awarded qualification or military occupational specialty, including without limitation the following designations:

(A) Aircraft pilot, navigator, or crew member;

(B) United States Navy SEAL or diver;

(C) United States Army Ranger;

(D) United States Special Forces member;

(E) Parachutist Badge; or

(F) Explosive Ordnance Disposal Technician;

(5) To be a recipient of the:

(A) Medal of Honor;

(B) Distinguished Service Cross;

(C) Navy Cross;

(D) Air Force Cross;

(E) Silver Star Medal;

(F) Purple Heart;

(G) Combat Infantryman Badge;

(H) Combat Action Badge;

(I) Combat Medical Badge;

(J) Combat Action Ribbon; or

(K) Air Force Combat Action Medal; or

(6) To have been a prisoner of war.

(c) Stolen valor is a:

(1) Class B misdemeanor for a second or subsequent violation or for a violation under subdivision (b)(5) of this section; or

(2) Class C misdemeanor if otherwise committed.

(d) The fines collected under this section by the municipality or county where the offense occurred shall be distributed to the Department of Veterans Affairs to be used to maintain and operate the veterans' homes established under § 20-81-105.

History. Acts 2017, No. 907, § 1.

5-37-219. Unlawful possession of a skimmer.

(a) As used in this section, “skimmer” means an electronic, photographic, visual imaging, recording, or other device capable of accessing, reading, recording, capturing, copying, imaging, scanning, reproducing, or storing in any manner financial sight order or payment card information.

(b) A person commits the offense of unlawful possession of a skimmer if he or she knowingly possesses a skimmer with the purpose to commit an offense under this subchapter.

(c) Unlawful possession of a skimmer is a Class C felony.

History. Acts 2017, No. 932, § 1.

5-37-226. Filing instruments affecting title or interest in real property.

(a) It is unlawful for a person with the knowledge of the instrument's lack of authenticity or genuineness to have placed of record in the office of the county recorder or the office of the Secretary of State any instrument:

(1) Clouding or adversely affecting:

(A) The title or interest of the true owner, lessee, or assignee in real property; or

(B) Any bona fide interest in real property; and

(2) With the purpose of:

(A) Clouding, adversely affecting, impairing, or discrediting the title or other interest in the real property which may prevent the true owner, lessee, or assignee from disposing of the real property or transferring or granting any interest in the real property; or

(B) Procuring money or value from the true owner, lessee, or assignee to clear the instrument from the records of the office of the county recorder or the office of the Secretary of State.

(b)(1)(A) A person who violates subsection (a) of this section is guilty of a Class A misdemeanor.

(B) Except as provided under subdivision (b)(2) of this section, a person who has a previous conviction under this section upon conviction is guilty of a Class D felony for a subsequent violation of subsection (a) of this section.

(2) However, a person who violates subsection (a) of this section is guilty of a Class C felony if the person violates subsection (a) of this section because of the performance of official duties by the victim and the victim is:

- (A) A judge or other court personnel;
- (B) A prosecuting attorney or deputy prosecuting attorney;
- (C) A state, county, or municipal law enforcement officer or jailer;
- (D) An employee of the Division of Correction;
- (E) An employee of the Division of Community Correction;
- (F) A judge, prosecuting attorney, deputy prosecuting attorney, law enforcement officer, or jailer from another state, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States;
- (G) A person elected to a federal, state, or local position; or
- (H) A person employed by the Attorney General.

(c) An owner, lessee, or assignee of real property located in the State of Arkansas who suffers loss or damages as a result of conduct that is prohibited under subsection (a) of this section and who must bring civil action to remove any cloud from his or her title or interest in the real property or to clear his or her title or interest in the real property is entitled to three (3) times actual damages, punitive damages, and costs, including any reasonable attorney's fees or other costs of litigation reasonably incurred.

(d) This section does not apply to a bona fide filing of lis pendens, materialmen's lien, laborer's lien, or other legitimate notice or protective filing as provided by law.

History. Acts 1995, No. 1086, §§ 1-3; 2011, No. 172, § 1; 2013, No. 1125, § 9; 2019, No. 910, § 674.

Amendments. The 2019 amendment substituted "Division of Correction" for

"Department of Correction" in (b)(2)(D) and substituted "Division of Community Correction" for "Department of Community Correction" in (b)(2)(E).

5-37-227. Financial identity fraud — Nonfinancial identity fraud — Restitution — Venue.

(a) A person commits financial identity fraud if the person:

(1) For his or her benefit or the benefit of a third party, accesses, obtains, records, or submits to a financial institution another person's identifying information with a purpose to create, obtain, or open a credit account, debit account, or financial resource without the authorization of the other person;

(2) Uses a scanning device, re-encoder, or a skimmer for the purpose of appropriating a financial resource, financial sight order information, or payment card information of another person to his or her own use or to the use of a third party without the authorization of the other person; or

(3) Transfers to another person a financial resource, a financial sight order, or payment card information knowing that the other person is

not entitled to obtain or possess the financial resource, financial sight order, or payment card information.

(b) A person commits nonfinancial identity fraud if he or she knowingly obtains another person's identifying information without the other person's authorization and uses the identifying information for any unlawful purpose, including without limitation:

- (1) To avoid apprehension or criminal prosecution;
- (2) To harass another person; or
- (3) To obtain or to attempt to obtain a good, service, real property, or medical information of another person.

(c) As used in this section:

- (1) "Check" means the same as defined in § 4-60-101;
- (2) "Debit card" means the same as defined in § 4-88-702;
- (3) "Disabled person" means the same as defined in § 4-88-201;
- (4) "Elder person" means the same as defined in § 4-88-201;
- (5) "Financial institution" includes without limitation a credit card company, bank, or any other type of lending or credit company or institution;

(6) "Financial resource" includes without limitation a credit card, debit card, or any other type of line of credit or loan;

(7) "Financial sight order or payment card information" means financial information that is:

(A) Contained on either side of a check or similar sight order or payment card; or

(B) Encoded on the magnetic strip or stripe of a payment card;

(8) "Identifying information" includes without limitation a:

(A) Social Security number;

(B) Driver's license number;

(C) Checking account number;

(D) Savings account number;

(E) Credit card number;

(F) Debit card number;

(G) Personal identification number;

(H) Electronic identification number;

(I) Digital signature; or

(J) Any other number or information that can be used to access a person's financial resources;

(9) "Payment card" means a debit card or credit card;

(10) "Re-encoder" means an electronic device that places encoded information from the computer chip or magnetic strip or stripe of a payment card onto the computer chip or magnetic strip or stripe of a different payment card, or any electronic medium that allows an authorized transaction to occur;

(11) "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card; and

(12) "Skimmer" means an electronic, photographic, visual imaging, recording, or other device capable of accessing, reading, recording,

capturing, copying, imaging, scanning, reproducing, or storing in any manner financial sight order or payment card information.

(d) The provisions of this section do not apply to any person who obtains another person's driver's license or other form of identification for the sole purpose of misrepresenting the actor's age.

(e)(1) Except as provided in subdivision (e)(2) of this section, financial identity fraud is a Class C felony.

(2) Financial identity fraud is a Class B felony if the victim is an elder person or a disabled person.

(f)(1) Except as provided in subdivision (f)(2) of this section, nonfinancial identity fraud is a Class D felony.

(2) Nonfinancial identity fraud is a Class C felony if the victim is an elder person or a disabled person.

(g)(1) In addition to any penalty imposed under this section, a violation of this section constitutes an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq.

(2) Any remedy, penalty, or authority granted to the Attorney General or another person under the Deceptive Trade Practices Act, § 4-88-101 et seq., is available to the Attorney General or that other person for the enforcement of this section.

(h)(1)(A) In addition to any penalty imposed under this section, upon conviction for financial identity fraud or nonfinancial identity fraud, a court may order the defendant to make restitution to any victim whose identifying information was appropriated or to the estate of the victim under § 5-4-205.

(B) In addition to any other authorized restitution, the restitution order described in subdivision (h)(1)(A) of this section may include without limitation restitution for the following financial losses:

(i) Any costs incurred by the victim in correcting the credit history or credit rating of the victim; and

(ii) Any costs incurred in connection with any civil or administrative proceeding to satisfy any debt, lien, or other obligation resulting from the theft of the victim's identifying information, including lost wages and attorney's fees.

(C) The court also may order restitution for financial loss to any other person or entity that suffers a financial loss from a violation of subsection (a) or subsection (b) of this section.

(2) A judgment entered under this section and § 5-4-205 does not bar a remedy available in a civil action to recover damages relating to financial identity fraud or nonfinancial identity fraud.

(i) Venue for any criminal prosecution under this section or any civil action to recover damages relating to financial identity fraud or nonfinancial identity fraud is proper in any of the following venues:

(1) In the county where the violation occurred;

(2) If the violation was committed in more than one (1) county, or if the elements of the offense were committed in more than one (1) county, then in any county where any violation occurred or where an element of the offense occurred;

(3) In the county where the victim resides; or

(4) In the county where property that was fraudulently used or attempted to be used was located at the time of the violation.

History. Acts 1999, No. 568, § 1; 1999, No. 1578, § 1; 2005, No. 280, § 1; 2005, No. 1018, § 1; 2007, No. 85, § 1; 2009, No. 748, § 20; 2017, No. 932, § 2.

A.C.R.C. Notes. The definition of “disabled person” referred to in subdivision (c)(3) of this section has been changed to “person with a disability” in § 4-88-201.

Amendments. The 2017 amendment rewrote (a); added (c)(1), (c)(2), (c)(7), (c)(9), and (c)(12) and redesignated the

remaining subdivisions of (c) accordingly; substituted “without limitation” for “but is not limited to” in (c)(5), (c)(6) and (c)(8); in (c)(10), inserted “computer chip or” twice and substituted “different payment card, or any electronic medium that allows an authorized transaction to occur” for “different card”; substituted “identity” for “identify” in (e)(2); and made stylistic changes.

SUBCHAPTER 3 — ARKANSAS HOT CHECK LAW

SECTION.

5-37-302. Unlawful acts.

5-37-305. Restitution and court costs.

5-37-302. Unlawful acts.

(a) It is unlawful for any person:

(1) To procure any article or thing of value or to secure possession of any personal property to which a lien has attached or to make payment of rent or to make payment of a child support payment or to make payment of any taxes, licenses, or fees, or any fine or court costs, or for any other purpose to make or draw or utter or deliver, with the intent to defraud, any check, draft, order, or any other form of presentment involving the transmission of account information for the payment of money upon any in-state or out-of-state bank, person, firm, or corporation, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in, or on deposit with, such bank, person, firm, or corporation for the payment of such check, draft, order, or other form of presentment involving the transmission of account information in full, and any other check, draft, order, or other form of presentment involving the transmission of account information upon such funds then outstanding;

(2) To make, draw, utter, or deliver or to cause or direct the making, drawing, uttering, or delivering of any check, draft, order, or any other form of presentment involving the transmission of account information for the payment of money on any in-state or out-of-state bank, person, firm, or corporation in payment of wages or salaries for personal services rendered, knowing that the maker, drawer, or payor does not have sufficient funds in or on deposit with such bank, person, firm, or corporation for the payment in full of such check, draft, order, or other form of presentment involving the transmission of account information as well as any other then-outstanding check, draft, order, or other form of presentment involving the transmission of account information upon

such funds, and with no good reason to believe the check, draft, order, or other form of presentment involving the transmission of account information would be paid upon presentation to the person or bank upon which same was drawn; or

(3) After he or she has made, drawn, uttered, or delivered a check, draft, order, or any other form of presentment involving the transmission of account information for the payment of money upon any in-state or out-of-state bank, to withdraw or cause to be withdrawn, with intent to defraud, the funds or any part of the funds that have been deposited in the bank before presentment of the check, draft, order, or any other form of presentment involving the transmission of account information for payment, without leaving sufficient funds in the bank for payment in full of the check, draft, order, or other form of presentment involving the transmission of account information and any other check, draft, or order upon the funds then outstanding.

(b)(1) Upon a determination of guilt of a person under this section, in the event that the order, draft, check, or other form of presentment involving the transmission of account information is one thousand dollars (\$1,000) or less, the penalties shall be as follows:

(A) For a first offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500) or imprisonment in the county jail or regional detention facility not to exceed thirty (30) days, or both;

(B) For a second offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or imprisonment in the county jail or regional detention facility not to exceed ninety (90) days, or both; and

(C) For a third or subsequent offense, the person is guilty of an unclassified misdemeanor and shall receive a fine of not less than two hundred dollars (\$200) nor more than two thousand dollars (\$2,000) or imprisonment in the county jail or regional detention facility not to exceed one (1) year, or both.

(2) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on a nonexistent account is a Class B felony if:

(A) The amount of any one (1) instrument or transaction is twenty-five thousand dollars (\$25,000) or more; or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount less than twenty-five thousand dollars (\$25,000), and the total amount of all such instruments or transactions is twenty-five thousand dollars (\$25,000) or more.

(3) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on nonexistent accounts is a Class C felony if:

(A) The amount of any one (1) instrument or transaction is less than twenty-five thousand dollars (\$25,000) but more than five thousand dollars (\$5,000); or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount of five thousand dollars (\$5,000) or less, and the total amount of all such instruments or transactions is more than five thousand dollars (\$5,000).

(4) Making, uttering, or delivering one (1) or more instruments or transactions drawn on insufficient funds or drawn on nonexistent accounts is a Class D felony if:

(A) The amount of any one (1) instrument or transaction is five thousand dollars (\$5,000) or less but more than one thousand dollars (\$1,000); or

(B) More than one (1) instrument or transaction has been drawn within a ninety-day period, each instrument or transaction is in an amount of one thousand dollars (\$1,000) or less, and the total amount of all such instruments or transactions is more than one thousand dollars (\$1,000).

(5) Under subdivisions (b)(2)(B), (b)(3)(B), and (b)(4)(B) of this section, each instrument or transaction may be added together in a single prosecution.

History. Acts 1959, No. 241, §§ 2-4; § 1; 1991, No. 1051, § 1; 2001, No. 1466, 1977, No. 155, § 1; 1981, No. 899, §§ 1, 2, § 1; 2015, No. 1263, § 10.
4; 1985, No. 1012, § 1; A.S.A. 1947, §§ 67-
720, 67-721, 67-725; Acts 1987, No. 69, **Amendments.** The 2015 amendment inserted designation (a); and added (b).

5-37-305. Restitution and court costs.

(a) Any court passing sentence upon a person convicted of any offense under this subchapter may also order the person to make full restitution to the plaintiff or complaining party.

(b) All court costs may be taxed to the convicted defendant.

History. Acts 1959, No. 241, § 5; 1961, No. 500, § 1; 1977, No. 766, § 1; 1981, No. 899, § 5; 1983, No. 473, § 2; 1983, No. 719, § 4; 1985, No. 254, § 1; A.S.A. 1947, § 67-723; Acts 2001, No. 1466, § 3; 2007, No. 632, § 1; 2009, No. 748, § 22; 2011, No. 570, § 28; 2013, No. 425, § 1; 2013, No. 1125, § 11; 2015, No. 1263, § 11.
Amendments. The 2015 amendment rewrote the section heading; deleted former (a) and (b); redesignated former (c)(1) as (a); substituted “this subchapter” for “§§ 5-37-301 — 5-37-306” in present (a); and redesignated former (c)(2) as (b).

SUBCHAPTER 4 — COMMUNICATION SERVICES AND DEVICES

SECTION.

5-37-402. Theft of communication services — Unlawful communication and access devices.

SECTION.

5-37-403. [Repealed.]

5-37-402. Theft of communication services — Unlawful communication and access devices.

(a) A person commits theft of communication services if he or she knowingly and with the intent to defraud a communication service provider:

(1) Obtains or attempts to obtain or uses a communication service without the authorization of or proper compensation paid to the communication service provider, or assists or instructs any other person in doing so with the intent to defraud the communication service provider;

(2) Tamper with, modifies, or maintains a modification to a communication device installed or provided by the communication service provider with the intent to defraud that communication service provider;

(3) Possesses with the intent to distribute, manufactures, develops, assembles, distributes, transfers, imports into this state, licenses, leases, sells or offers, promotes or advertises for sale, use, or distribution any communication device:

(A) For the commission of a theft of a communication service or to receive, intercept, disrupt, transmit, retransmit, decrypt, or acquire or facilitate the receipt, interception, disruption, transmission, retransmission, decryption, or acquisition of any communication service without the express consent or express authorization of the communication service provider, as stated in a contract or otherwise; or

(B) With the intent to conceal or to assist another to conceal from any communication service provider or from any lawful authority the existence or place of origin or destination of any communication, provided that the concealment is for the purpose of committing a violation of subdivision (a)(3)(A) of this section;

(4) Tamper or otherwise interferes with or connects to by any means, whether mechanical, electrical, acoustical, or other means, any cable, wire, or other device used for the distribution of cable television without authority from the operator of the service, modifies, alters, programs, or reprograms a communication device for a purpose described in subdivision (a)(3) of this section;

(5) Possesses, uses, manufactures, develops, assembles, distributes, imports into this state, licenses, transfers, leases, sells, offers, promotes, or advertises for sale, use, or distribution any unlawful access device; or

(6) Possesses, uses, prepares, distributes, sells, gives, transfers, offers, promotes, or advertises for sale, use, or distribution any:

(A) Plans or instructions for making, assembling, or developing any unlawful access device under circumstances evidencing an intent to use or employ the communication device or unlawful access device, or to allow the communication device or unlawful access device to be used or employed for a purpose prohibited by this subchapter, or

knowing or having reason to believe that the communication device or unlawful access device is intended to be so used, or that the plans or instructions are intended to be used for manufacturing or assembling the communication device or unlawful access device for a purpose prohibited by this subchapter; or

(B) Material, including hardware, a cable, a tool, data, computer software, or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture, assembly, or development of a communication device for a purpose prohibited by this subchapter, or for use in the manufacture, assembly, or development of an unlawful access device.

(b)(1) However, nothing in this section shall be construed to prohibit the manufacture, importation, sale, lease, or possession of any television device possessing the internal hardware necessary to receive a cable television signal without the use of a converter, device, or box, or of any television advertised as “cable ready”.

(2) A person that manufactures, produces, assembles, designs, sells, distributes, licenses, or develops a multipurpose device is not in violation of this section unless that person acts knowingly and with an intent to defraud a communication service provider and the multipurpose device:

(A) Is manufactured, developed, assembled, produced, designed, distributed, sold, or licensed for the primary purpose of committing a violation of this section;

(B) Has only a limited commercially significant purpose or use other than as an unlawful access device or for the commission of any other violation of this section; or

(C) Is marketed by that person or another person in concert with that person with that person’s knowledge for use as an unlawful access device or for the purpose of committing any other violation of this section.

(3) Nothing in this section requires that the design of or design and selection of a part, software code, or component for a communication device provide for a response to any particular technology, device, or software, or any component or part thereof, used by the provider, owner, or licensee of any communication service or of any data, audio or video program, or transmission to protect any such communication, data, audio or video service, program, or transmission from unauthorized receipt, acquisition, interception, access, decryption, disclosure, communication, transmission, or retransmission.

(4) This section does not apply to the following entities or persons when lawfully acting in the capacity listed in this subdivision (b)(4) and as expressly authorized to do so by any other state or federal statute or regulation:

(A) State or local law enforcement agency;

(B) State or local government authority, municipality, or agency;
and

(C) Communication service provider.

(c)(1) A person who violates subdivision (a)(1) or subdivision (a)(2) of this section upon conviction is guilty of a Class B misdemeanor.

(2) A person who violates one (1) or more of subdivisions (a)(3)-(6) of this section upon conviction is guilty of a Class D felony.

(3) An offense under this section is a Class C felony if:

(A) The defendant has been convicted previously on two (2) or more occasions for an offense under this subchapter or for any similar crime in this state or any federal or other state jurisdiction; or

(B) The violation of this subchapter involves possession of more than fifty (50) communication devices or unlawful access devices.

(d) The penalty for an offense under this section when based upon a prior conviction includes without limitation a felony offense involving theft of service or fraud under this subchapter or a violation of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, as in effect on March 1, 2003.

(e) The court shall sentence a person convicted of violating this subchapter to make restitution as authorized by law, in addition to any other sentence authorized by law.

(f) Upon conviction of a defendant under this section, the court may direct that the defendant forfeit any communication device or unlawful access device in the defendant's possession or control that was involved in the violation for which the defendant was convicted, in addition to any other sentence authorized by law.

History. Acts 1985, No. 781, § 2; A.S.A. 1947, § 41-2211; Acts 1997, No. 348, § 1; 2003, No. 1806, § 2; 2015, No. 1263, § 12.

Amendments. The 2015 amendment added (c) through (f).

U.S. Code. The federal Cable Communications Policy Act of 1984, Pub. L. No. 98-549, is codified primarily as 47 U.S.C. § 521 et seq.

5-37-403. [Repealed.]

Publisher's Notes. This section, concerning penalties for theft of communications services, was repealed by Acts 2015, No. 1263, § 13. The section was derived

from Acts 1985, No. 781, § 3; A.S.A. 1947, § 41-2212; Acts 1997, No. 348, § 2; 2003, No. 1806, § 3.

SUBCHAPTER 5 — BUSINESS AND COMMERCIAL OFFENSES GENERALLY

SECTION.

5-37-506. Prohibited activity by a procurer or provider.

5-37-506. Prohibited activity by a procurer or provider.

(a) A person commits the offense of prohibited activity by a procurer or provider if:

(1) The person is a procurer and he or she knowingly:

(A) Offers or gives anything of value to a person in order to cause the person to seek medical care from a specific healthcare provider; or

- (B) Solicits a person currently under the care of a chiropractic physician to seek care from another chiropractic physician; or
- (2) The person is a provider and he or she knowingly permits a procurer that he or she uses, directs, or employs to engage in conduct prohibited by subdivision (a)(1) of this section.
- (b) Prohibited activity by a procurer or provider is a Class D felony.

History. Acts 2013, No. 513, § 1; 2015, No. 1155, § 8. inserted “or provider” following “procurer” in the section heading and (a).

Amendments. The 2015 amendment

CHAPTER 38

DAMAGE OR DESTRUCTION OF PROPERTY

- SUBCHAPTER.
- 2. OFFENSES GENERALLY.
 - 3. ARSON AND OTHER BURNING.

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION. and electric power companies.

5-38-206. Damaging wires and other fixtures of telephone, cable,

5-38-203. Criminal mischief in the first degree.

CASE NOTES

ANALYSIS

Evidence.
Evidence Insufficient.

Evidence.

Trial court properly convicted defendant of theft of scrap metal under § 5-36-123 and first-degree criminal mischief under this section because defendant’s girlfriend admitted that she and defendant were depicted in photos taken by a motion-activated camera, and while her testimony did not have to be corroborated as to the misdemeanors pursuant to § 16-89-111(e), circumstantial evidence independently established the crimes and tended to connect defendant to the commission of those crimes. The photos indicated that defendant and his girlfriend were near the wire prior to its being stolen, a signal maintainer testified that he did not leave unused wire on the ground when replacing the stolen wire, and there was testimony that the theft of the wire stopped after defendant was

caught. *Procella v. State*, 2016 Ark. App. 515, 504 S.W.3d 686 (2016).

Substantial evidence supported the circuit court’s delinquency finding where two witnesses had identified the juvenile as the one who damaged the victim’s car, and the court found the juvenile and her witnesses not credible. *T.S. v. State*, 2017 Ark. App. 578, 534 S.W.3d 160 (2017).

Evidence Insufficient.

Jury resorted to speculation and conjecture to reach its guilty verdict on the charge of criminal mischief; defendant did not have permission to have possession of the vehicle over the weekend, the evidence reasonably indicated that he abandoned the vehicle after being pursued by law enforcement, and the car was not found for almost 24 hours, located along a public road, and although it was possible that defendant purposely damaged the owner’s vehicle, it was equally possible and a reasonable hypothesis that another person did. *Lemley v. State*, 2015 Ark. App. 691, 477 S.W.3d 526 (2015).

5-38-206. Damaging wires and other fixtures of telephone, cable, and electric power companies.

(a) It is unlawful for a person to knowingly damage, destroy, or pull down:

(1) A telephone, cable communications, or electric power transmission pedestal or pole owned or operated by a telephone, cable, or electric power company;

(2) A telephone, cable communications, or electric power line, wire, fiber insulator, power supply transformer, transmission, or other apparatus, equipment, or fixture, including without limitation a backup deep cycle battery or other power supply, used in the transmission of telephone, cable communications, or electric power owned or operated by a telephone, cable, or electric power company; or

(3) Equipment related to wireless communications that are regulated by the Federal Communications Commission.

(b) It is unlawful for a person to knowingly damage, destroy, remove, or alter in a way that could result in physical injury any electric power line, gas line, water line, wire or fiber insulator, electric motor, or other similar apparatus connected to a farm shop, an on-farm grain drying and storage complex, a heating and cooling system, an environmental control system, an animal production facility, an irrigation system, or a dwelling.

(c) A violation of this section is a Class D felony.

History. Acts 2009, No. 390, § 1; 2011, No. 1120, § 10; 2019, No. 311, § 2. inserted “including without limitation a backup deep cycle battery or other power supply” in (a)(2).

Amendments. The 2019 amendment

SUBCHAPTER 3 — ARSON AND OTHER BURNING

SECTION.

5-38-301. Arson.

5-38-301. Arson.

(a) A person commits arson if he or she:

(1) Starts a fire or causes an explosion with the purpose of destroying or otherwise damaging:

(A) An occupiable structure or motor vehicle that is the property of another person;

(B) Any property, whether his or her own or property of another person, for the purpose of collecting any insurance for the property;

(C) Any property, whether his or her own or property of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person;

(D) A vital public facility;

(E) Any dedicated church property used as a place of worship exempt from taxes pursuant to § 26-3-301;

(F) Any public building or occupiable structure that is either owned or leased by the state or any political subdivision of the state; or

(G) An area of real property being used for the commercial growth of timber or other agricultural product, if:

(i) Timber or other agricultural product is destroyed or made commercially nonviable; and

(ii) The value of the destroyed or commercially nonviable timber or other agricultural product is more than five thousand dollars (\$5,000); or

(2) Recklessly causes a fire or an explosion in the course of and in furtherance of a felony or in immediate flight after committing a felony that results in destroying or otherwise damaging:

(A) Any occupiable structure or motor vehicle;

(B) Any property, if the fire or explosion creates a risk of death or serious physical injury to any person;

(C) A vital public facility;

(D) Any dedicated church property used as a place of worship exempt from taxes pursuant to § 26-3-301; or

(E) Any public building or occupiable structure that is either owned or leased by the state or any political subdivision of the state.

(b) Arson is a:

(1) Class A misdemeanor if the property sustains less than five hundred dollars (\$500) worth of damage;

(2) Class D felony if the property sustains at least five hundred dollars (\$500) but less than two thousand five hundred dollars (\$2,500) worth of damage;

(3) Class C felony if the property sustains at least two thousand five hundred dollars (\$2,500) but less than five thousand dollars (\$5,000) worth of damage;

(4) Class B felony if:

(A) The property sustains at least five thousand dollars (\$5,000) but less than fifteen thousand dollars (\$15,000) worth of damage; or

(B) The arson is under subdivision (a)(1)(G) of this section;

(5) Class A felony if the property sustains at least fifteen thousand dollars (\$15,000) but less than one hundred thousand dollars (\$100,000) worth of damage; or

(6) Class Y felony if the property sustains damage in an amount of at least one hundred thousand dollars (\$100,000).

(c) As used in this section, "motor vehicle" means every self-propelled device in, upon, or by which any person or property is, or may be, transported or drawn upon a street or highway.

(d)(1)(A) If the Governor deems it necessary, he or she may offer a reward not to exceed fifty thousand dollars (\$50,000) for information leading to the apprehension, arrest, and conviction of a person who has committed, attempted to commit, or conspired to commit a criminal offense under this section.

(B) The fifty-thousand-dollar reward maximum imposed by this section only applies to state-appropriated funds.

(C) The Governor may increase the amount of any reward offered by use of funds from the Reward Pool Fund created in this section.

(2) When the Governor offers a reward pursuant to this section, he or she may place any reasonable condition upon collection of the reward as he or she deems necessary.

(3)(A) The Governor may establish and administer a fund to be known as the "Reward Pool Fund".

(B) Any monetary donation or gift made by a private citizen or corporation for the purpose of offering a reward or enhancing a state-funded reward offered for information leading to the apprehension, arrest, and conviction of a person who has committed, attempted to commit, or conspired to commit a criminal offense under this section shall be deposited into the fund.

(C)(i) The Governor shall have the sole discretion to determine if and how much of the fund is offered in a particular criminal case.

(ii) However, if the donor places any lawful restriction or instruction on use of the donation at the time it is given, the restriction or instruction shall be honored.

(4) Any person completing the requirements to be eligible for the reward is entitled to the reward offered by the Governor, and the Governor shall certify the amount of the reward to the Auditor of State, who shall issue his or her warrant on the State Treasury for the reward, to be paid out of any money appropriated or deposited into the fund.

History. Acts 1975, No. 280, § 1902; 1981, No. 544, § 1; A.S.A. 1947, § 41-1902; Acts 1987, No. 242, § 1; 1991, No. 299, § 1; 1997, No. 921, § 1; 2005, No. 1529, § 1; 2007, No. 827, § 42; 2017, No. 630, § 2.

Amendments. The 2017 amendment added (a)(1)(G); redesignated former (b)(4) as the introductory language of (b)(4) and (b)(4)(A); and added (b)(4)(B).

CASE NOTES

ANALYSIS

Appellate Review.
Evidence.

Appellate Review.

Substantial evidence supported defendant's arson and first-degree murder convictions; however, the case was reversed and remanded for a new trial because the record was not sufficient for the Supreme Court of Arkansas to conduct its review under Ark. Sup. Ct. R. 4-3(i). *Thrower v. State*, 2018 Ark. 256, 554 S.W.3d 825 (2018).

Evidence.

There was substantial evidence to overcome a motion for directed verdict because there was evidence that defendant had opportunity and motive, had displayed

anger towards his wife, and had acted on that anger by destroying items in the home, and thus his arson conviction was affirmed; a great deal of the case hinged on testimony, and while defendant's testimony contradicted the testimony of other witnesses, the jury was free to believe or disbelieve all or any part of any witness's testimony. *Booth v. State*, 2014 Ark. App. 572, 444 S.W.3d 900 (2014).

There was substantial evidence supporting defendant's convictions for arson and residential burglary, including testimony that the fire was not accidental, that defendant was seen coming from the direction of the apartment with a pack of cigarettes and a lighter after the fire, and that defendant sent the victim a text making references to a fire her father had started when she was younger. *Fronter-*

house v. State, 2015 Ark. App. 211, 463 S.W.3d 312 (2015).

Defendant's confession that he started the first fire that burned the cabin down, along with the cabin owner's testimony that the electricity and propane were disconnected at the time of the fire and that defendant had repeatedly threatened to

burn the cabin days before the fire, and defendant's admission to removing the crime-scene tape, setting the second fire, and having someone remove the scrap metal from the scene, was sufficient to support his conviction for arson. *Molpus v. State*, 2015 Ark. App. 452, 469 S.W.3d 374 (2015).

CHAPTER 39

BURGLARY, TRESPASS, AND OTHER INTRUSIONS

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. OFFENSES GENERALLY.
3. OFFENSES INVOLVING POSTED AND ENCLOSED LAND.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-39-101. Definitions.

5-39-101. Definitions.

As used in this chapter:

(1) "Artifact" means an object produced or shaped by human craft, such as a tool, weapon, coin, or ornament of archaeological, cultural, or historical interest or significance;

(2) "Commercial occupiable structure" means a vehicle, building, or other structure in which:

(A) Any person carries on a business or other calling; or

(B) People assemble for a purpose of business, government, education, religion, entertainment, or public transportation;

(3)(A) "Enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to enter or remain in or upon the premises.

(B)(i) A person who enters or remains in or upon premises that are at the time open to the public does so with license and privilege, regardless of his or her purpose, unless he or she defies a lawful order not to enter or remain on the premises personally communicated to the person by the owner of the premises or another person authorized by the owner.

(ii) A license or privilege to enter or remain in or upon premises only part of which are open to the public is not a license or privilege to enter or remain in a part of the premises not open to the public.

(C) A person who enters or remains upon unimproved and apparently unused land not fenced or otherwise enclosed in a manner designed to exclude an intruder does so with license and privilege unless:

(i) Notice not to enter or remain is personally communicated to the person by the owner or a person authorized by the owner; or

- (ii) Notice is given by posting in a conspicuous manner;
- (4) “Harvesting device” means a device or object used to collect or accumulate, or to assist in the collection or accumulation of, an agricultural resource or a natural resource in bulk;
- (5) “Killing device” means a firearm, bladed weapon, or other object, when not used in the course of lawful hunting or fishing of wildlife;
- (6) “Natural resource” means materials or substances such as minerals, timber, water, plants, and fertile land that occur in nature and can be used for economic gain;
- (7) “Premises” means an occupiable structure and any real property;
- (8)(A) “Residential occupiable structure” means a vehicle, building, or other structure:
 - (i) In which any person lives; or
 - (ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present.
- (B) “Residential occupiable structure” includes each unit of a residential occupiable structure divided into a separately occupied unit; and
- (9) “Vehicle” means any craft or device designed for the transportation of a person or property across land or water or through the air.

History. Acts 1975, No. 280, § 2001; A.S.A. 1947, § 41-2001; Acts 1993, No. 442, § 1; 1993, No. 552, § 1; 2017, No. 877, § 2.

Amendments. The 2017 amendment added the definitions for “Artifact”, “Harvesting device”, “Killing device”, and “Natural resource”.

CASE NOTES

ANALYSIS

Enter or Remain Unlawfully.
Occupiable Structure.

Enter or Remain Unlawfully.

Substantial evidence demonstrated that defendant entered or remained unlawfully on a commercial retailer’s property, where there was no evidence that the retailer expressly or impliedly rescinded a notification banning defendant from its property. *Brasuell v. State*, 2015 Ark. App. 559, 472 S.W.3d 499 (2015).

Defendant entered the victim’s home while he was asleep and then pointed the gun at him, telling him to prepare to die; thus, there was sufficient evidence to support a finding that defendant unlawfully entered or remained in the victim’s home and defendant’s conviction for aggravated residential burglary was affirmed. Although defendant testified that the victim had sent her a text stating that she was always welcome in his home, she did not introduce the text message into evidence,

the jury was not required to believe her self-serving testimony, and the jury could have found that defendant no longer had a license or privilege to enter the victim’s home on the night of the shooting. *Rose v. State*, 2015 Ark. App. 563, 472 S.W.3d 167 (2015).

Denying a directed verdict motion on a residential burglary charge was not error as the testimony showed that a neighbor left her door unlocked for her boyfriend or defendant’s wife, not for defendant, and thus, the evidence showed that defendant had entered the neighbor’s home unlawfully even though he and his wife had keys to the home. *Holly v. State*, 2017 Ark. 201 (2017).

Occupiable Structure.

Victim’s garage fell within the definition of a “residential occupiable structure,” because it was a building or structure in which the victim lived and was functionally interconnected with and immediately congruous to the main structure in which

the victim lived. *Horton v. State*, 2014 Ark. App. 250 (2014).

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

5-39-203. Criminal trespass.

5-39-201. Residential burglary — Commercial burglary.

CASE NOTES

ANALYSIS

Evidence.

Evidence Insufficient.

Intent.

Misdemeanor Theft.

Occupiable Structure.

Prejudicial Exclusion of Evidence.

Relationship to Other Laws.

Sentence.

Sufficient Evidence.

Evidence.

There was substantial evidence to support a conviction for residential burglary where defendant came to the victim's home, kicked in her door, and stated "I come here to take it"; defendant then grabbed the victim by the arm, began "tussling" with her, and raped her. From this evidence, the jury could have inferred that defendant intended either to rob or rape the victim, either of which was a crime punishable by imprisonment. *Burris v. State*, 2015 Ark. App. 126 (2015).

Evidence was sufficient to support defendant's conviction for residential burglary because defendant texted the victim on the morning of the burglary to confirm the victim's whereabouts, defendant was at the victim's house around the time of the burglary later that morning, defendant was seen driving defendant's car toward a town immediately thereafter, and defendant was in possession of the victim's Xbox when defendant sold it in a pawn shop in the town. *Brickey v. State*, 2015 Ark. App. 175 (2015).

There was substantial evidence supporting defendant's convictions for arson and residential burglary, including testimony that the fire was not accidental, that defendant was seen coming from the direction of the apartment with a pack of cigarettes and a lighter after the fire, and

that defendant sent the victim a text making references to a fire her father had started when she was younger. *Fronterhouse v. State*, 2015 Ark. App. 211, 463 S.W.3d 312 (2015).

Substantial evidence supported defendant's conviction for residential burglary because the circumstances were plainly sufficient to allow the trial court to reasonably infer, without resort to speculation or conjecture, that he entered the victim's home with the purpose of assaulting her; defendant violently broke into the victim's home, chased her, tried to prevent her from being able to call for help, verbally threatened her safety, and immediately thereafter physically beat her. *Davis v. State*, 2015 Ark. App. 234, 459 S.W.3d 821 (2015).

Evidence Insufficient.

There was insufficient evidence to support defendant's conviction for commercial burglary, because the retailer was open to the public, defendant's purpose in entering the store was not determinative, and there was no evidence that he had been banned from the premises. *Todd v. State*, 2016 Ark. App. 280, 494 S.W.3d 444 (2016).

Defendant's conviction for residential burglary in a bench trial was not supported by sufficient evidence, because the trial court did not find that defendant went to the residence with the purpose of committing a theft of property within the residence, as charged, but found only that he went there to commit an offense punishable by imprisonment and that he was not invited. *Williams v. State*, 2018 Ark. App. 349, 553 S.W.3d 753 (2018).

Intent.

Circuit court erred in convicting defendant of attempted residential burglary;

even though he was caught unlawfully entering his girlfriend's former residence while holding a small bag and fled when her daughter yelled at him, there was no evidence that he did so with the purpose or specific intent of committing therein a theft of property. There was no evidence to show whether the bag was empty or contained something, defendant was not a complete stranger to the daughter or to the residence, the illegal entry was in the middle of the day, and the window was known to not close properly. *Whitworth v. State*, 2017 Ark. App. 462, 531 S.W.3d 407 (2017).

Misdemeanor Theft.

In a case involving stolen university exams, the trial court did not err in finding that the requirements of subsection (b) of this section were met because misdemeanor theft is punishable by one year imprisonment; no minimum value was required to be shown, and the testimony supported the State's assertion that the exams had inherent value to the students, to the professors themselves, and to the university as an academic institution. *Gillean v. State*, 2015 Ark. App. 698, 478 S.W.3d 255 (2015).

Occupiable Structure.

Defendant's appeal of a residential burglary conviction was frivolous because, inter alia, defendant entered an occupiable structure, even though the cabin did not have running water at the time of defendant's entry. *Guthrie v. State*, 2017 Ark. App. 681 (2017).

Prejudicial Exclusion of Evidence.

Trial court incorrectly applied Ark. R. Evid. 613 and abused its discretion in excluding questions during the cross-examination of the investigating detective; defense counsel was not attempting to impeach the detective with a prior inconsistent statement but instead the purpose of the questions was to show that the homeowner got so poor a look at the intruder that she could not identify him as older than age 16 and that her state of mind was prejudicially influenced by the media coverage. The exclusion of the evidence required reversal. *Brigance v. State*, 2018 Ark. App. 213, 548 S.W.3d 147 (2018).

Relationship to Other Laws.

United States Supreme Court vacated the U.S. Court of Appeals for the Eighth

Circuit's judgment that a defendant who was convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. § 922, was not subject to a minimum sentence of 15 years' imprisonment under the Armed Career Criminal Act ("ACCA") because his conviction under § 5-39-201 did not fall within the ACCA's definition of "burglary"; however, the case was remanded because lower courts had not addressed the defendant's claim that the Arkansas residential burglary statute was too broad to count as generic burglary because it covered burglary of vehicles. *United States v. Stitt*, 139 S. Ct. 399, 202 L. Ed. 2d 364 (2018).

Sentence.

Where defendant's conviction for aggravated residential burglary under § 5-39-204 was reversed because there was insufficient evidence that defendant attempted to inflict a serious physical injury and defendant did not dispute that residential burglary was proven, his 40-year sentence was modified to the maximum allowed for residential burglary, a Class B felony, which was 20 years' imprisonment. *Inskeep v. State*, 2016 Ark. App. 135, 484 S.W.3d 709 (2016).

Sufficient Evidence.

Even though defendant was not convicted of second-degree assault, there was sufficient evidence that he entered the owner's home to commit that offense, as the owner saw defendant swinging at his wife inside the home after he chased her there with a knife, and thus there was a substantial risk of injury to the wife, which showed defendant's intent; defendant's residential burglary conviction was supported by substantial evidence. *Whitfield v. State*, 2014 Ark. App. 380, 438 S.W.3d 289 (2014).

Substantial evidence demonstrated that defendant entered or remained unlawfully on a commercial retailer's property, in violation of this section, where there was no evidence that the retailer expressly or impliedly rescinded a notification banning defendant from its property. *Brasuell v. State*, 2015 Ark. App. 559, 472 S.W.3d 499 (2015).

Defendant entered the victim's home while he was asleep and then pointed the gun at him, telling him to prepare to die; thus, there was substantial evidence to

support a finding that defendant unlawfully entered or remained in the victim's home and defendant's conviction for aggravated residential burglary was affirmed. Although defendant testified that the victim had sent her a text stating that she was always welcome in his home, she did not introduce the text message into evidence, the jury was not required to believe her self-serving testimony, and the jury could have found that defendant no longer had a license or privilege to enter the victim's home on the night of the shooting. *Rose v. State*, 2015 Ark. App. 563, 472 S.W.3d 167 (2015).

Denying a directed verdict motion on a residential burglary charge was not error as the testimony showed that a neighbor left her door unlocked for her boyfriend or defendant's wife, not for defendant, and thus, the evidence showed that defendant had entered the neighbor's home unlawfully even though he and his wife had keys to the home. *Holly v. State*, 2017 Ark. 201 (2017).

Evidence was sufficient to convict defendant of residential burglary because, regardless of whether the victim or her son denied defendant entry or told him to leave, defendant's license or privilege to enter the home was revoked once he inflicted injury upon the victim; and the jury could have inferred that defendant intended to sexually assault the victim, which was a felony, as, upon learning the victim was in the bath, he entered the bathroom, opened the shower curtain, touched her breast, and touched her vagina. *Holland v. State*, 2017 Ark. App. 49, 510 S.W.3d 311 (2017).

Defendant's residential-burglary conviction was affirmed where the victim's testimony that her home had been broken into, jewelry was missing, and she was emotionally affected as a result made clear that defendant and his accomplices were not authorized to take or exercise control over the victim's property. *Hubbard v. State*, 2017 Ark. App. 93, 513 S.W.3d 289 (2017).

Trial court did not err in denying defendant's directed verdict motions, as evidence that defendant was seen leaving the victim's residence and was found 30 minutes later in possession of recently stolen property taken from the residence was sufficient to support defendant's convictions for residential burglary and theft of

property. *Owens v. State*, 2017 Ark. App. 353 (2017).

Evidence was sufficient to convict defendant of residential burglary where the apartment door was damaged and the mother asked defendant to stop disciplining the child and asked her father to come check things out; the evidence was sufficient to show that defendant did not have permission to enter. *Jefferson v. State*, 2017 Ark. App. 492, 532 S.W.3d 75 (2017).

State presented sufficient evidence as to both elements of residential burglary where the homeowner testified about the circumstances surrounding the unlawful entry, firing her gun at appellant, and appellant running away, appellant was treated for a gunshot wound mere hours after the intrusion, and his jacket was found with a bullet hole and blood stains that matched his DNA. *Brigance v. State*, 2018 Ark. App. 213, 548 S.W.3d 147 (2018).

Substantial evidence supported defendant's conviction for residential burglary because defendant was seen in the area where the burglary had occurred wearing clothes like those worn by one of the burglars and driving an SUV that matched the description of the SUV seen by a witness and a detective; defendant was in possession of the flat-screen television that was stolen, and he was in possession of tools that would be helpful to commit a burglary. *Nelson v. State*, 2018 Ark. App. 454, 558 S.W.3d 894 (2018).

Evidence supported defendant's convictions for residential burglary and theft of property because the victim testified that defendant, whom the victim had never seen before, was walking down the driveway away from the victim's house when the victim returned after a short errand and that the victim discovered items were taken from the house. Defendant also gave a police detective an inconsistent explanation as to why defendant was in the victim's neighborhood and attempted to flee when officers arrived at the house where defendant was located (no-merit brief). *Sanford v. State*, 2019 Ark. App. 10, 567 S.W.3d 553 (2019).

Sufficient evidence supported defendant's residential burglary and interference with custody convictions given the trial testimony that he forced open the victim's apartment door and took her child against her will (no-merit brief). *Kelley v.*

State, 2019 Ark. App. 71, 568 S.W.3d 801 (2019).

5-39-202. Breaking or entering.

CASE NOTES

Evidence.

There was sufficient evidence to support a conviction for breaking and entering under this section because there was direct evidence that a victim's purse was taken from her vehicle, defendant was in possession of her purse the morning after it was taken, he lived only a few blocks from the victim's residence, he used at least one of defendant's credit cards and attempted to use her automatic teller machine card to no avail, and he spent the money he found in the purse. Given this direct evidence, there was also circumstantial evidence sufficient to support an inference that defendant was the person who entered the vehicle and took the purse. *Piper v. State*, 2014 Ark. App. 472, 442 S.W.3d 17 (2014).

Breaking and entering conviction under this section was supported by substantial evidence where defendant unlocked the door of a vehicle and rummaged through its contents; his account regarding his purpose of retrieving a phone and the vehicle's ownership were of no consequence because the issue of credibility was up to the jury. *Clark v. State*, 2015 Ark. App. 142, 457 S.W.3d 305 (2015).

Defendant was properly convicted of breaking or entering into a vending ma-

chine because there was evidence that he struck a vending machine with a hammer to the point that there was full access to the money contained therein, defendant admitted that he struck the machine with the intent to steal the money, and it was immaterial that he did not actually take any money from the machine. *Hill v. State*, 2015 Ark. App. 630, 475 S.W.3d 568 (2015).

Defendant's conviction for breaking and entering was supported by his admission to entering an apparently unlocked car and that he "might've had a hand in" taking the checkbook. *Todd v. State*, 2016 Ark. App. 280, 494 S.W.3d 444 (2016).

Evidence was sufficient to convict defendant of felony breaking or entering as a reasonable inference could be drawn that defendant entered with the purpose of committing a theft because he admitted he did not have permission to enter the house; the jury clearly did not credit his statements to the police that he entered the house looking for a house to repair or rent or his statement that he thought the house was abandoned; and defendant and co-defendant entered through the back door and left with items that did not belong to them. *Jeffries v. State*, 2017 Ark. App. 62, 510 S.W.3d 267 (2017).

5-39-203. Criminal trespass.

(a) A person commits criminal trespass if he or she purposely enters or remains unlawfully in or upon:

- (1) A vehicle of another person; or
- (2) The premises owned or leased by another person.

(b) Criminal trespass is a:

(1) Class D felony if the person has two (2) or more convictions for a Class A misdemeanor violation of this section or § 5-39-305;

(2) Class A misdemeanor if:

(A) At the time of the criminal trespass, the person is in possession of one (1) or more of the following:

- (i) A killing device;
- (ii) A harvesting device;
- (iii) A device primarily used for the location and unearthing of buried or submerged artifacts; or

(iv) A tool designed to gain entry into a structure by breaking a lock or breaking through a fence, including without limitation a boltcutter;

(B) The person is on premises containing a commercial fishing or fish breeding operation and at that time is in possession of a fishing pole or net designed to capture fish; or

(C) The person has a prior conviction for a violation of this section;

(3) Class B misdemeanor if:

(A) The vehicle or premises involved is an occupiable structure; or

(B) The conduct involves the removal of a posted sign, a fence, or a portion of a fence as defined in § 2-39-102; or

(4) Class C misdemeanor if otherwise committed.

(c) It is a defense to prosecution under this section that:

(1) The person was a guest or invitee;

(2) The person was required to enter upon the premises of the other person for a business reason or for health and safety reasons;

(3) The person was authorized by law to enter upon the premises;

(4) The privately owned premises were made open to the public; or

(5) The person owns or is employed by a person or entity that owns property adjoining the premises and is traveling over the premises with good faith or for a legitimate reason.

(d) This section does not apply to the following persons who are acting in the line of duty or within the scope of their employment:

(1) A law enforcement officer;

(2) A firefighter;

(3) An emergency first responder;

(4) An employee of a state agency, court, or school who is tasked with monitoring, supervising, or making direct contact with a minor or the parents of a minor concerning the well-being of the minor; or

(5) An employee of a federal, state, or local agency, commission, board, political subdivision, school district, or municipality who has entered onto or remains on the premises for a purpose directly relating to the employee's employment with the federal, state, or local agency, commission, board, political subdivision, school district, or municipality.

(e)(1) It is an affirmative defense to prosecution under this section if the person who enters the premises of another person is:

(A) Temporarily on the premises of the other person for the sole purpose of recovering livestock, a dog, or any other domesticated animal; and

(B) Either:

(i) The owner of the livestock, dog, or other domesticated animal; or

(ii) An employee or agent of the owner of the livestock, dog, or other domesticated animal.

(2) A person who enters the premises of another person as described in subdivision (e)(1) of this section is subject to civil liability for any property damage that occurs in the course of recovering the livestock, dog, or other domesticated animal.

(f) A person aggrieved by a violation of this section is granted a private cause of action against the person who violated this section and is entitled to recover:

- (1) Actual damages caused by the violation;
- (2) Reasonable attorney's fees; and
- (3) Punitive damages.

History. Acts 1975, No. 280, § 2004; A.S.A. 1947, § 41-2004; Acts 2013, No. 960, § 2; 2017, No. 877, § 3.

Amendments. The 2017 amendment rewrote the section.

5-39-204. Aggravated residential burglary.

CASE NOTES

ANALYSIS

Evidence, Admission.
Insufficient Evidence.
Sufficient Evidence.

Evidence, Admission.

Where cross-examination of the victim at trial revealed that the State's exhibit of text messages between the defendant and victim was incomplete and that the victim had deleted some of the messages, the appellate court did not have to decide whether the circuit court erred in failing to strike the exhibit because any error that existed was harmless given the overwhelming evidence of defendant's guilt that remained. *Farmer v. State*, 2019 Ark. App. 148, 571 S.W.3d 78 (2019).

Insufficient Evidence.

Conviction for aggravated residential burglary was reversed because there was insufficient evidence that defendant attempted to inflict a serious physical injury under subdivision (a)(2) of this section. Serious physical injury could be inflicted during a sexual assault, but under current Arkansas law, a sexual assault does not necessarily constitute a serious physical injury; even assuming that defendant did intend to sexually assault the victim, defendant's intention, combined with his grabbing her shoulder and causing a minor scratch to her baby's face, did not constitute a substantial step under § 5-3-201 toward inflicting a serious physical injury, as defined by § 5-1-102. *Inskeep v. State*, 2016 Ark. App. 135, 484 S.W.3d 709 (2016).

Where defendant's conviction for aggravated residential burglary was reversed

and defendant did not dispute that residential burglary was proven, his 40-year sentence was modified to the maximum allowed for residential burglary, a Class B felony, which was 20 years' imprisonment. *Inskeep v. State*, 2016 Ark. App. 135, 484 S.W.3d 709 (2016).

Sufficient Evidence.

Defendant's conviction for aggravated burglary was supported by the victim's belief that defendant had a gun and might shoot her and the fact that the victim's garage fell within the definition of a "residential occupiable structure" under § 5-39-101(4)(A)(i), because it was a building or structure in which the victim lived. *Horton v. State*, 2014 Ark. App. 250 (2014).

Evidence was sufficient to convict defendant of aggravated residential burglary because defendant was an accomplice in the aggravated residential burglary, and, thus, it was irrelevant whether defendant entered the house or not as her accomplice clearly entered the house; defendant was in the vicinity of the crime, she was holding a knife, and, according to the victim's testimony, she ran toward the victim with the knife after the victim chased the accomplice out of his house; and the trial court was not required to believe defendant's version of events that the accomplice never asked defendant to assist with the crime, and her testimony that she would never use a knife in a violent manner. *Wilson v. State*, 2016 Ark. App. 218, 489 S.W.3d 716 (2016).

Evidence that defendant entered a home without permission in the middle of the night, armed with a gun that he bran-

dished at the victim, and threatened to kill the victim was sufficient for the jury to find that defendant entered the home with the intent to commit a felony, and thus

supported defendant's conviction for aggravated residential burglary. *Armour v. State*, 2016 Ark. App. 612, 509 S.W.3d 668 (2016).

SUBCHAPTER 3 — OFFENSES INVOLVING POSTED AND ENCLOSED LAND

SECTION.

5-39-305. Criminal trespass on premises

located in unincorporated area.

5-39-305. Criminal trespass on premises located in unincorporated area.

(a)(1) A person shall not purposely enter without written permission of the owner or lessee upon another person's premises located outside the boundary of any city or town if those premises are either:

(A) Lawfully posted;

(B) Crop land or timber land; or

(C) Enclosed with a fence sufficient under § 2-39-101 et seq.

(2) The posting of premises is not a requirement under this section.

(b) Criminal trespass on premises located in an unincorporated area is a:

(1) Class D felony if the person has two (2) or more convictions for a Class A misdemeanor violation of this section or § 5-39-203;

(2) Class A misdemeanor if:

(A) At the time of the criminal trespass on premises located in an unincorporated area, the person is in possession of one (1) or more of the following:

(i) A killing device;

(ii) A harvesting device;

(iii) A device primarily used for the location and unearthing of buried or submerged artifacts; or

(iv) A tool designed to gain entry into a structure by breaking a lock or breaking through a fence, including without limitation a boltcutter;

(B) The person is on premises containing a commercial fishing or fish breeding operation and at that time is in possession of a fishing pole or net designed to capture fish; or

(C) The person has a prior conviction for a violation of this section;

(3) Class B misdemeanor if:

(A) The premises involved is an occupiable structure; or

(B) The conduct involves the removal of a posted sign, a fence, or a portion of a fence as defined in § 2-39-102; or

(4) Violation with a fine not to exceed one hundred dollars (\$100) if otherwise committed.

(c) It is an affirmative defense to a prosecution that:

(1) The person was a guest or invitee;

(2) The person was required to enter upon the premises of the other person for a business reason or for health and safety reasons;

(3) The person was authorized by law to enter upon the premises;

(4) The privately owned premises were made open to the public; or
 (5) The person owns or is employed by a person or entity that owns property adjoining the premises and is traveling over the premises with good faith or for a legitimate reason.

(d) This section does not apply to:

(1) Public land;
 (2) A law enforcement or wildlife officer acting in the line of duty; or
 (3) The following persons who are acting in the line of duty or within the scope of their employment:

(A) A law enforcement officer;
 (B) A firefighter;
 (C) An emergency first responder;
 (D) An employee of a state agency, court, or school who is tasked with monitoring, supervising, or making direct contact with a minor or the parents of a minor concerning the well-being of the minor; or
 (E) An employee of a federal, state, or local agency, commission, board, political subdivision, school district, or municipality who has entered onto or remains on the premises for a purpose directly relating to the employee's employment with the federal, state, or local agency, commission, board, political subdivision, school district, or municipality.

(e)(1) It is an affirmative defense to prosecution under this section if the person who enters the premises of another person is:

(A) Temporarily on the premises of the other person for the sole purpose of recovering livestock, a dog, or any other domesticated animal; and

(B) Either:

(i) The owner of the livestock, dog, or other domesticated animal; or

(ii) An employee or agent of the owner of the livestock, dog, or other domesticated animal.

(2) A person who enters the premises of another person as described in subdivision (e)(1) of this section is subject to civil liability for any property damage that occurs in the course of recovering the livestock, dog, or other domesticated animal.

(f) This section does not repeal any law concerning posting of land or trespass.

History. Acts 1995, No. 870, §§ 1, 2; substituted “premises” for “land” in the 1999, No. 1029, § 4; 2017, No. 877, § 4. section heading; and rewrote the section.

Amendments. The 2017 amendment

CHAPTER 41**COMPUTERS, COMPUTER SYSTEMS, AND NETWORKS****SUBCHAPTER 1 — COMPUTER FRAUD, TRESPASS, AND COMMUNICATIONS****5-41-103. Computer fraud.****RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

5-41-104. Computer trespass.**RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

CASE NOTES**Relation to Trade Secrets.**

Not all claims asserted against a former employee were preempted by the Arkansas Trade Secrets Act; as to a tortious interference claim, an amended complaint alleged that, in addition to a theft of information, former clients were con-

tacted to solicit their business. Moreover, an allegation that confidential information was deleted fell within the definition of criminal trespass, which was not based on misappropriation of a trade secret. *Jenkins v. APS Ins., LLC*, 2013 Ark. App. 746, 431 S.W.3d 356 (2013).

5-41-106. Civil actions.**RESEARCH REFERENCES****U. Ark. Little Rock L. Rev.**

J. Lyn Entrikin, *The Right of Privacy in Arkansas: A Progressive State*, 35 U. Ark. Little Rock L. Rev. 439 (2013).

CASE NOTES

Cited: *Jenkins v. APS Ins., LLC*, 2013 Ark. App. 746, 431 S.W.3d 356 (2013).

5-41-108. Unlawful computerized communications.**RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

5-41-109. Disclosure of personal information.**RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

SUBCHAPTER 2 — COMPUTERS AND NETWORKS**5-41-202. Unlawful act regarding a computer.****RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

**5-41-203. Unlawful interference with access to computers —
Unlawful use or access to computers.****RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

5-41-204. Unlawful use of encryption.**RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

5-41-205. Unlawful act involving electronic mail.**RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

5-41-206. Computer password disclosure.**RESEARCH REFERENCES**

ALR. Validity, Construction, and Application of State Computer Crime and Fraud Laws. 87 A.L.R.6th 1.

